SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 39.

NELSON STORY, PLAINTIFF IN ERROR,

vs.

MADISON M. BLACK AND ROSA G. BLACK.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

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1 *Statement on Motion for New Trial.*

In the District Court of the First Judicial District of Montana Territory within and for Gallatin County.

NELSON STORY, Plaintiff,
vs.
MADISON M. BLACK and ROSA G. BLACK, Defendants.

The plaintiff in the above-entitled action filed his complaint herein on the second day of March, A. D. 1880, to wit:

Complaint.

In the District Court of the First Judicial District of the Territory of Montana within and for Gallatin County.

NELSON STORY, Plaintiff,
vs.
MADISON M. BLACK and ROSA G. BLACK, Defendants.

Nelson Story, the plaintiff in the above-entitled action, com-
2 plains of Madison M. Black and Rosa G. Black, the defendants, and alleges the following facts, constituting his cause of action:

The plaintiff was, on the twenty-ninth day of December, 1879, ever since has been, and now is the owner, seized in fee-simple, and entitled to the possession of the following-described parcel of land, situate in the county of Gallatin and Territory of Montana, to wit: Lots numbered sixteen and seventeen in block A of Black's addition to the town of Bozeman City, and all the rights, privileges, and appurtenances thereunto belonging.

The said defendants, on the 24th day of January, 1880, were wrongfully and unlawfully in possession of said real estate.

On said day last mentioned the plaintiff demanded possession of said premises of the defendants, who then and there refused and ever since and now refuse to surrender possession thereof to the plaintiff, and continue to withhold the same from him, wrongfully and unlawfully.

3 The value of the use, occupation, rents, and profits of the said real estate during the time the same has been so withheld is twenty-five dollars per month, and by the withholding thereof the plaintiff is damaged in the sum of one hundred dollars.

Wherefore the plaintiff prays judgment against the said defendant, 1st, for the recovery of the possession of the demanded premises; 2nd, for the sum of one hundred dollars damages for the withholding the same from the possession of the plaintiff; 3rd, for the value of the rents and profits thereof, at the rate of twenty-five dollars per month, from the said 29th day of December, 1879, to the date of judgment, and also for costs of suit.

J. J. DAVIS,
Att'y for Plaintiff.

(Verified.)

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The above-named defendants, on the seventh day of May, A. D. 1880, filed their answer to the said complaint of the plaintiff herein, of which said answer, in words and figures, the following is a copy, to wit:

4 *Answer.*

In the District Court, First Judicial District, in & for Gallatin County, Montana Territory.

NELSON STORY, Plaintiff,
vs.
MADISON M. BLACK and ROSA G. BLACK, Defendants.

Now come the defendants and, 1st, for answer to the complaint of the plaintiff herein, deny that plaintiff was, on the 29th day of December, A. D. 1879, or at any other time was, or now is the owner, or seized in fee-simple or otherwise of or entitled to the possession of the parcel of land described in his said complaint, or any part thereof, or any of the rights, privileges or appurtenances to the same, or any thereof belonging or appertaining.

2nd. Admit that said defendants were in possession of the said property at the date mentioned in the complaint, and that they still continue in said possession, but deny that such possession was or is wrongful or unlawful.

5 3rd. Deny that the use, occupation, rents, issues, and profits of said property is of the value of twenty-five dollars per month, or was during the time mentioned in said complaint worth said amount, or any greater sum than fifteen dollars per month.

4. Deny that he has been damaged by reason of the withholding of said property in the sum of one hundred dollars or any other sum.

And the said defendants, for further answer, shows unto this honorable court that heretofore, to wit, on the 31st day of August, A. D. 1875, Leander M. Black, the father of said Madison M. Black, on the event of the intermarriage between the said Madison M. Black and Rosa G. Black, the other defendant and wife of the said Madison M. Black, and long before the indebtedness hereinafter mentioned accrued, did make and execute to the said Rosa G. Black a good and sufficient deed for the following-described real estate, to wit: Commencing on or at the northwest corner of block B, in

6 Black's addition to the town of Bozeman, thence running east seventy feet, thence south one hundred and fifty feet, thence west seventy feet, thence north one hundred and fifty feet to the place of beginning, the same fronting seventy feet on Babcock street, on the south side thereof, and known as Black's residence.

That said defendants, in pursuance of their title and right so acquired as aforesaid, which was intended for and was a bridal present to the said Rosa G. Black, wife of his said son, Madison M. Black, did at once enter into the actual possession and occupation of said property, and did continue so to occupy and possess the same and have charge and control of the same in their own right, exclusive of

any other, until some time in July, A. D. 1877; that at the time last aforesaid, and long before the acquisition of any lien or claim of said plaintiff hereinafter mentioned, and while the said property was free from all liens and incumbrances, the said Leander M. Black and these defendants mutually agreed to barter and ex-
7 change and did barter and exchange in that the said Madison M. Black and Rosa G. Black did accept and receive the property mentioned in the complaint for the property hereinbefore particularly described, and in pursuance thereof the respective parties exchanged possession, and your said defendants did then and there take possession of the said property and have ever since occupied and possessed the same, and improved the same at great expense.

That soon after the barter and exchange of the property aforesaid, and before any of the pretended liens or incumbrances hereinafter mentioned accrued, the said Leander M. Black sold and transferred, by deed duly executed, and for a valuable consideration, the said property originally given, granted, & conveyed to Rosa G. Black to one Peter Koch, who now holds the legal and equitable title to the same; that the said Leander M. Black agreed to make and execute to these defendants a deed for the property described in said complaint so exchanged and delivered to these defendants, and occupied and improved by them in good faith upon the strength of their
8 rights, equities, and title thereto; that in pursuance of such agreement, actual exchange, delivery to, and acceptance of possession by these defendants the said Leander M. Black did have and procure from Edwin W. Toole, to whom he had hitherto conveyed said property with other property, a deed to said Rosa G. Black for said property; that said Edwin W. Toole did, on account of the facts and premises aforesaid, on the 28th day of June, A. D. 1879, make, execute, and deliver to her, the said Rosa G. Black, a good and sufficient deed for the property in said complaint mentioned; by reason whereof, on the day aforesaid, the said trust and equitable title of defendants was merged into and became a legal title, by virtue of all of which they were and now are in possession and entitled to the possession of said property.

And said defendants, for further answer, show unto this honorable court that said plaintiff, upon an indebtedness due and owing from said Leander M. Black to him, after these defendants had so taken possession of and occupied and improved said property,
9 caused the same to be attached in a certain suit upon said indebtedness, wherein the said Story was plaintiff and the said Leander M. Black was defendant, in the district court of the first judicial district, Gallatin county, Montana Territory; that thereafter he recovered a judgment in said action, and procured and had said property sold under an execution issued therein, and did receive a deed for all the right, title, and interest of the said Leander M. Black in said property, and became and was substituted to all the right and title of the said Leander M. Black in said property; that the same was and is subject to the superior and paramount title of these defendants and constitutes all the claim or pretended claim of said

plaintiff of, in, or to, said property. Wherefore defendants ask judgment for their costs and disbursements in this behalf expended.

VIVION & PIERCE &
E. W. & J. K. TOOLE,
Att'ys for Def'ts.

Verified in the usual form.

10 The plaintiff, on the thirteenth day of December, A. D. 1880, filed his amended replication to said answer, to wit:

Amended Replication.

In the District Court, First Judicial District, in & for Gallatin County, Montana Territory.

NELSON STORY, Plaintiff,
vs.
MADISON M. BLACK and ROSA G. BLACK, Defendants.

The plaintiff, for amended replication to the answer of the defendants herein—leave for filing the same having been granted by the court—denies upon information and belief that on the 31st day of August, 1875, or at any other time the said Leander M. Black did make or execute to the defendants a good or sufficient deed for the real estate particularly described in said answer, or that any deed for said property was ever executed by him to the said Rosa
11 G. Black, or that in pursuance of the same the defendants did at any time enter into possession of or occupy the same, or that by virtue of any deed they did continue to occupy or possess the same, or to have charge or control thereof in their own right exclusive of any other, until July, 1877, or any other time or date; denies upon information and belief that at any time prior to the liens and incumbrances of the plaintiff the said Leander M. Black and the defendants mutually did barter or exchange the property mentioned in the answer for the demanded premises, or that in pursuance of said pretended barter or exchange defendants did accept and receive the demanded premises in lieu of that mentioned in the said answer, or that in pursuance thereof the said Leander M. Black exchanged possession with the defendants, or that in pursuance thereof the defendants took possession or have since occupied, possessed, or improved the demanded premises.

The plaintiff admits that the property particularly de-
12 scribed in said answer was sold and conveyed by the said Leander M. Black to Peter Koch, but avers that the said property was and ever had been since the thirty-first day of August, 1875, the property of the said Leander M. Black, and stood upon the records of said Gallatin county in his name until so sold and conveyed by him to said Koch.

The plaintiff denies, upon information and belief, that the said Leander M. Black agreed to execute and deliver to the defendants a deed for the demanded premises, or that in pursuance of any agreement or said pretended exchange he did procure a deed to be

executed therefor from one Edwin W. Toole to the defendants, or that said Toole, to carry out any such agreement, executed any deed, and avers that said deed made by said Leander M. Black to said Toole, as also the said deed executed by the said Toole to the said Rosa G. Black, were made, executed, and delivered by the parties thereto long subsequent and after the liens and rights of the plaintiff hereinafter mentioned had accrued, and with full knowledge thereof, and notice on the part of said Toole, said Leander
13 M. Black and the defendants, and that by virtue of said deed or deeds said defendants or said Toole acquired no title or right as against the title of the plaintiff, and the same are a fraud on plaintiff's title.

And the plaintiff avers that at the time of said alleged barter for said property, and for a long time prior thereto, to wit, in July, 1877, the said Leander M. Black was largely indebted to this plaintiff, upon which the judgment hereinafter mentioned was rendered by the court in favor of this plaintiff, and against the said Leander M. Black, and in other large amounts.

That the said Leander M. Black was largely indebted to divers other persons in said July, 1877, his debts being equal, or nearly so, to the value of his property, and was, as plaintiff is informed and believes, insolvent and incapable in law of giving or granting, in consideration of love and affection, any property whatever to his children or others, and that the said Leander M. Black has ever since been insolvent and unable to pay or discharge the said indebtedness.

14 And as to the allegations in said answer concerning the title and claims of the plaintiff to said demanded property, the plaintiff avers the facts to be:

That at the date hereinafter mentioned the said Leander M. Black, being as aforesaid indebted to the plaintiff, to collect the same the said plaintiff commenced an action in this court against the said Leander M. Black, in which action this plaintiff was the plaintiff, and said Leander M. Black was the defendant. That on or about the 10th day of July, 1873, this plaintiff sued out a writ of attachment in said action, which was duly issued out of said court and directed and delivered to the sheriff of said Gallatin county for service and execution, commanding him to attach the property of the said Leander M. Black, or so much thereof as might be sufficient to satisfy the demand of the plaintiff in said action; that at that time and for a long time prior thereto the said demanded premises was the property of the said Leander M. Black, and stood upon
15 the records of said county in his name, and said property was, by virtue of said writ, on the 12th day of July, 1878, duly levied upon and attached by said sheriff to satisfy the demand of the plaintiff in said action; that afterwards, to wit, on the 12th day of May, 1879, judgment was duly rendered by said court in said action in favor of the plaintiff and against the said Leander M. Black. And for the satisfaction of said judgment, an execution was duly issued out of said court directed and delivered to said sheriff, under and by virtue of which said sheriff did sell said attached property,

the demanded premises, at sheriff's sale, according to law, on or about the 27th day of June, 1879; at which sale this plaintiff became the purchaser of said demanded premises, and afterwards the said plaintiff received a good and sufficient sheriff's deed therefor from said sheriff, whereby the plaintiff became and is possessed of all the right, title, and interest of the said Leander M. Black therein at the date of the levy of said attachment.

16 And the plaintiff denies that his title to the demanded premises was or is subject to the title of the defendants, but avers that his said title is superior and paramount to the pretended title of defendants.

Wherefor- the plaintiff asks judgment as prayed for in his complaint.

J. J. DAVIS,
F. K. ARMSTRONG &
SANDERS & CULLEN,
Att'ys for Pl'ff.

(Verified.)

That thereafter, on the twenty-sixth day of April, A. D. 1881, this action came on regularly for trial before the court, a trial by jury having been expressly waived by the parties hereto; and the plaintiff, to maintain the issues on his part, offered in evidence the judgment roll and records in an action commenced in the above-entitled court on the twenty-eighth day of February, A.D. 1878, and wherein said Nelson Story was the plaintiff and Leander M. Black was the defendant, and proving thereby the following facts; that the complaint was

17 filed therein on the twenty-eighth day of February, A. D. 1878; that the summons was served personally on said Leander M. Black; that said Black filed his answer therein; that an affidavit and undertaking on attachment were filed, and that a writ of attachment was duly issued on the tenth day of July, A. D. 1878, from said court to the sheriff of said Gallatin county; that the said sheriff on said tenth day of July, 1878, under said writ of attachment, levied upon the real property of said Black, in Bozeman, county aforesaid, including the property described in the complaint in this action; that thereafter on the twelfth day of May, A. D. 1879, at a regular term of said court, a judgment was duly entered in open court by the agreement of said parties in favor of said Nelson Story and against said Leander M. Black for the sum of $13.235.64; that an execution was regularly issued out of said court on the twenty-fifth day of May, A. D. 1879; that the sheriff of said Gallatin county, under said execution, on the twenty-seventh day of June, A.

18 D. 1879, sold the property described in the complaint in this action to said Story, the highest bidder therefor, for the sum of fifteen hundred dollars, and then executed and delivered to said Story a certificate of the sale of said property, and that on the twenty-ninth day of December, A. D. 1879, the said sheriff under the law of Montana Territory, and by virtue of the proceedings aforesaid, made, executed, and delivered a sheriff's deed conveying all the right, title, and interest of L. M. Black to said Story of said property.

The plaintiff then offered in evidence a deed from William H. Babcock to said Leander M. Black, duly recorded in the office of the county clerk and recorder of said Gallatin county, on the fourteenth day of April, A. D. 1871, in book H, page 246 of the records of said office. Said deed conveyed to said Leander M. Black and vested in him the title of said Babcock to a tract of land including that described in the complaint herein.

It was here admitted that the plaintiff made a demand for
19 the possession of the property described in the complaint upon the twenty-fourth day of January, A. D. 1880, and that the rent of said property was worth fifteen dollars per month, and the plaintiff rested.

The defendant- then called Madison M. Black, who testified as follows: "I am one of the defendants. I married Rosa G. Black, the defendant, in Bozeman, on August 31st, A. D. 1875. On the night of this day a reception was held at the North Pacific Hotel in Bozeman, and my father, Leander M. Black, took me [to] one side and congratulated me and told me he had presented Rosa, my wife, with the Koch property; that the deed for the same was lying on the piano in the parlor with the other presents, and directed me to take possession of the same, which I did that evening and remained in possession of the same from that night, August 31st, 1875, until some time in July, 1877; that upon the faith of the gift I put permanent and lasting improvements upon the said property, by beauti-
20 fying and ornamenting the grounds with trees and shrubbery and by bringing water upon the same and digging ditches for that purpose; I also painted the house on the outside and papered and painted on the inside, and built a barn on the back of said lot. Some time in the latter part of June or first of July, 1877, — I was coming from Miles City to Bozeman, I met my father near Countryman's place on the Yellowstone, and — that he desired to exchange the Koch property with me for the Randall property; we talked the matter over and agreed upon the exchange. I informed my wife and she was satisfied to make the exchange, and we did so exchange the Koch property for the property in controversy. James G. Dow was my father's agent and had the keys to the Randall property. I went to him (Dow) and got the keys and immediately went into the property in controversy; this was in the month of July, 1877; my wife and myself have been in possession continuously from that time up to the present time, and are in possession now. At the time of the
21 exchange L. M. Black (my father) agreed to make my wife a deed for the said property, and upon the faith of the agreement to make a deed and the exchange of the property we placed upon the property permanent, valuable and lasting improvements by building an addition to the house 16 × 25 feet, one story high, and finishing it off complete, dug a well, made a well house, also stable and hen house, planted trees in the yard, made fencing, dug ditches, and brought water into the yard and garden. I expended and paid out at least six hundred dollars ($600.00), and this amount does not include my own work or any pay for my own services, which consisted in painting and papering on the outside and inside of the

house. Prior to my marriage and the gift of the Koch property on the 31st of August, 1875, my father (L. M. Black) removed all his furniture except that portion that he gave to me at the time of my marriage from the Koch property to the Northern Pacific Hotel, and he never occupied or exercised any control over it from
22 and after August 31st, 1875, until he got it back from us by virtue of the trade and exchange in July, 1877. My father was away from Bozeman, in Washington and elsewhere, and when in Bozeman he sometimes staid with myself and wife, and sometimes staid at the N. P. Hotel. We were glad to have him with us whenever it was convenient for him so to be; and *that* my father, L. M. Black, never had any control or did he ever exercise any control or ownership to my knowledge over the Koch property from August 31st, 1875, until July, 1877, nor did he ever exercise ownership or control over the Randall property from July, 1877, up to this time. In 1875, at the time of the gift, my father had at least one hundred thousand dollars in cash and personal property, besides his real estate, which was valued and was worth seventy-five thousand dollars ($75.000.00). At that time there were no debts, liens, or incumbrances whatever against my father (L. M. Black) that I know of. I was his agent at that time and in a situation to
23 know his financial standing, and at the time of the exchange of the Koch property for the Randall property he was worth at least one hundred thousand dollars."

The witness then testified to what is contained in plaintiff's exception numbered 2 and filed in this action, to which the plaintiff excepted, and upon the overruling of his objection excepted and saved his following bill of exceptions, to wit:

Plaintiff's Exception No. 2.

In the District Court, First Judicial District, County of Gallatin, Montana Territory.

NELSON STORY *vs.* MADISON M. BLACK and ROSA G. BLACK.

Ex. No. 2.

Be it remembered that upon the trial of this action the defendants produced as a witness Madison M. Black, who, being duly sworn, testified as follows: "In the latter part of June, 1877, I agreed with my father, Leander M. Black, to exchange the house and
24 lot described in the answer of defendants as Black's residence for another house and parcel of land in Bozeman, Gallatin county, Montana. The latter is the property described in the complaint. This agreement was made verbally."

To the introduction of this testimony the plaintiff objected on the ground that the same was incompetent and irrelevant and not in writing. Whereupon the court overruled the objection, and to the action of the court in overruling said objection the plaintiff at the time excepted, and asks that this his bill of exceptions be signed and sealed, which is done accordingly.

E. J. CONGER, *Judge.* [SEAL.]

(Add to second page of exception, after word "Bozeman," that the residence known as the Black residence had been given to him and *and* his wife as a wedding present at their marriage, Aug. 31st, 1875, and they went into possession of it on the night of such marriage, under said gift, and remained in such possession
25 and improved the property by planting trees and bringing upon it irrigating ditches, and continued to so occupy and possess it until the exchange was perfected, some time in July, 1877, when he retook possession of said property, and said defendants under said exchange went into possession of said property in question and occupied and improved it by putting an addition costing about $600.00, also dug a well, put on a fence, set out trees, constructed irrigating ditches to and on it, &c., all of which was done on the strength of the exchange and delivery of possession.

That in the spring of 1878 said L. M. Black sold the property, so exchanged to one Peter Koch.)

E. J. CONGER, *Judge.*

At the time of the exchange in July, 1877, this exchange was made and I got the property and keys thereto from James G. Dow, agent of my father.

Cross-examined by plaintiff:

A part of the furniture in the Koch house belonged to me and a part of it was my father's when I was married. The presents were taken up to this house from the hotel, except some silver.
26 In October, 1876, I went to Tongue river and returned to Bozeman in July, 1877. My wife was in the States about eleven months and returned in October, 1877. I had charge of the Northern Pacific Hotel as agent for my father. The members of L. M. Black's family paid me visits at the Koch house. There was no person present when I and my father exchanged properties. In October, 1877, I was my father's agent and in charge of his property in Bozeman, and collected his rents. The Koch house was empty when I came back in July, 1877.

This witness also testified, together with Rosa G. Black, James D. Chestnut, L. J. P. Morrill, Robert P. Vivion, A. Lamme, and C. P Blakely, to what is contained in plaintiff's exception numbered 1, and filed in this action, to which the plaintiff objected, and upon the overruling of his objection excepted and saved the following bill of exceptions, to wit:

Plaintiff's Exceptions No. 1.

In the District Court, First Judicial District, County of Gallatin, Montana Territory.

NELSON STORY, Plaintiff,
27 *vs.*
MADISON M. BLACK and ROSA G. BLACK, Defendants.

Be it remembered that upon the trial of the above-entitled action

the defendants produced as witnesses Madison M. Black, Rosa G. Black, James D. Chesnut, L. P. J. Morrill, Robert P. Vivion, A. Lamme, and C. P. Blakely, who, being duly sworn, testified as follows: That they were present at the North Pacific Hotel, in Bozeman, county aforesaid, on the night of August 31, 1875, at a reception following the marriage of said defendants on that date; that it was the general talk and understanding at the time that Leander M. Black, the father of said Madison M. Black, had given to the defendants, as a wedding present, the land and dwelling-house thereon, described as Black's residence in the answer, and situated in said Bozeman; that an envelope was seen upon a piano, on which the wedding presents had been deposited, containing the words "Deed to house and lot presented by L. M. Black," and that none of the said witnesses saw any conveyance or deed of said property to any parties.

28 To the introduction of this testimony the plaintiff objected on the ground that the same was irrelevant and immaterial and insufficient to convey or affect real property. Whereupon the court overruled said objection, and to the action of the court in overruling said objection the plaintiff at the time excepted, and asks that this his bill of exceptions be signed and sealed, which is done accordingly.

(Signed) E. J. CONGER, *Judge.* [L. S.]

ROSA G. BLACK was then called and testified:

I am one of the defendants herein; I married Madison M. Black August 31st, 1875. We had a reception at the North Pacific Hotel, and went to the Koch house that night. We lived there till the fall of 1876, when I went east and was absent about eleven months. Mr. Wilkinson was my tenant, and I received rent for two months from him while I was east. Mr. Wilkinson paid me a portion of the rent in advance and sent me the balance as it became due. He occupied the house (the Koch property) up or near to the time of exchange, in July, 1877.

29 This witness testified to what is contained in said plaintiff's exception numbered 1, which is contained on page 5 of this statement.

When I came back in October, 1877, I boarded about two months, and we went into the Randall house about January 1, 1878, and have been there since that date. My husband was my agent. I was informed and consulted in reference to the exchange and consented to it. Leander M. Black said he would have the deed made out to me and I suppose he did it.

Cross-examined by plaintiff.

I did not tell Mrs. Perkins Russell that Mr. Black had not given me the Koch property. I talked with her about the presents. On the night of my marriage L. M. Black said he had given us the property. I did not tell Mrs. George W. Wakefield that L. M. Black refused to give me a deed. I don't think I told Mrs. Wakefield L. M. Black said he would deed the Koch property to me if he deeded it to anybody.

James D. Chesnut was then called and testified to what is contained in plaintiff's said exception numbered 1, which is contained on page — of this statement: "Was present at the marriage
30 of defendants at the church; attended the reception at the Northern Pacific Hotel. Among the presents was an envelope purporting to be a deed from his father for the Koch property as a present to the defendants; it was among the presents on the piano and marked 'Deed to house and lot from Leander M. Black.' I got my knowledge from seeing the deed or envelope on the piano and what it purported to be. It was a large legal envelope and was not in the handwriting of either of the defendants. The deed, among the other presents, was talked over generally among the guests that evening. I furnished the lumber, sash, doors, and did the planing for the addition built by John Stevens; the material was ordered by defendants and paid for by defendants."

JOHN STEVENS was then called and testified:

"In the fall of 1877 I built the addition to the Randall house. The work and lumber and other materials cost about $350.00. This was only for the rough carpenter work. Leander M. Black told me he wanted this work done for Madison M. Black in October, 1877, and that M. M. Black would pay me out of the store, which he did."

31 C. P. BLAKELY was then called and testified:

"I know the parties to this action. In 1879 I was the under sheriff of said Gallatin county, and sold at public sale, under an execution in favor of said Story and against said Leander M. Black, the Randall property described in the complaint herein. The sale was made on the twenty-seventh day of June, 1879. There were about one hundred persons in front of this property when it was sold, and before the sale I read the following notice, at the request of the attorney for the defendants, to the crowd:

"To all whom it may concern:

"This is to notify all persons that we claim lots 16 x 17, block A, in Black's addition to the town of Bozeman, in Gallatin county, Montana Territory, as the sole and separate property of the undersigned.

"MAD. M. BLACK.
"ROSA G. BLACK.

"Dated this 27th day of June, 1879."

After this notice was read the said Nelson Story was the highest and only bidder for the said property, and the same was sold to said Story.

32 The witness then testified to what is contained in plaintiff's said exception numbered 1, which is contained on page — of this statement.

JACOB MALIN was then called and testified:

"In November, 1877, my brother, Aime J. Malin, was the county

clerk of said Gallatin county. I heard Leander M. Black ask my brother to make out a deed of the Randall property to the defendant, Rosa G. Black. I saw him write the deed, but don't know what became of the deed."

A. Lamme was then called and sworn and testified, and also Robert P. Vivion.

The evidence of these witnesses is contained in plaintiff's said exception numbered 1, which is contained on page — of this statement.

L. J. P. MORRILL was then called and testified:

The witness testified to what is contained in plaintiff's said exception numbered 1, which is contained on page — of this statement.

IRA H. PIERCE was then called and testified:

I was consulted by Leander M. Black at the time he sold the Koch property to Peter Koch, on the eighteenth day of May, 1878,
33 and am one of the attorneys for the defendants. The witness then stated the conversation between himself and said Leander M. Black, which was objected to by the plaintiff, and the objection was sustained by the court, and the same was excluded.

EDWIN W. TOOLE was then called and testified:

"I received from Leander M. Black a deed to certain real property in Bozeman, including the property in controversy, in trust for Rosa G. Black, the trust extending only to the property in controversy. L. M. Black directing me, at the time of said conveyance, to make, execute, and deliver to Rosa G. Black a deed for the property in controversy, which I subsequently did. We were in doubt, at the time of the execution of the deed from L. M. Black to me, as to the numbers of the lots so directed by him to be deeded to Rosa G. Black, as aforesaid, which was filed for record in the office of the clerk and recorder of said Gallatin county on the thirteenth day of May, 1879, and was recorded in the book 1 of deeds, page 73 of the record of said county."

The deed was then read in evidence.

34 Know all men by these presents that I, Leander M. Black, of Lewis and Clarke county, Montana Territory, for and in consideration of the sum of seven thousand dollars to me in hand paid by Edwin W. Toole, of the county and Territory aforesaid, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto him, the said Edwin W. Toole, and to his heirs and assigns, forever the following-described property situate in the town of Bozeman, county of Gallatin, Territory of Montana, to wit: 20 feet off west side lot 5 and 1½ feet off east side lot 4, block B, original plat said city of Bozeman, being 21½ feet front on south side of Main street, extending back 140 feet; 26½ feet front on lot No. 1, block E,

original plat aforesaid, back for 63 feet, then 28 feet wide for 57 feet back north, thence 30 feet further north, then 30 feet wide for 30 feet further north; lots No-. 12, 13, & 14, and 19½ feet off of E. side of lot No. 11, in block F; lots 1, 2, 3, 4, 5, 6, 7, 8, & 9, block B, Black's addition to said town of Bozeman; lots 16 & 17 in block A; lots
35 3, 4, 5, 6, 7, 8, 9, & 10 in block D, in said Black's addition, 13 feet wide off of side of lot No. 6 & 13 feet off of side of lot No. 7, running back the full length of said lots in block — original plat said city, 30 feet wide and 140 feet deep; lots Nos. 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, & 17 in block G, in said Black's addition to said town; lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, & 14 in block F, in said Black's addition; lots Nos. 16, 17, 20, 21, 22 in block A, in said Black's addition to said town, commencing 70 feet east of N. W. corner of block B in said addition, thence east 79 feet, thence south 151½ feet, thence west 79 feet, thence north 79 feet to the place of beginning, together with all other real estate to me belonging or in which I may have an interest, or which may appear in my name of record in the said city of Bozeman. These presents are intended to convey and do hereby bargain, sell, transfer, and convey, unto him, the said Edwin W. Toole, all my real estate, and all real estate in which I have an interest of any kind whatever, which is situate in the said town of Bozeman, or any addition thereto, whether the same is correctly described herein or in any manner particularly described or not; and for a correct and particular description of any and all of said property, being all I have or own, or in which I have any interest in the said city of Bozeman and its additions, reference is made to the records of the recorder of the said county of Gallatin and Territory of Montana; to have and to hold the same unto the said Edwin W. Toole, his heirs and assigns, forever.

36

In testimony whereof I have hereunto set my hand and seal this 3rd day of May, A. D. 1879.

LEANDER M. BLACK. [SEAL.]

(Duly acknowledged.)

I made a deed to the defendant, Rosa G. Black, of the property in controversy on the twenty-sixth day of June, 1879, which was recorded on the twenty-eighth day of June, 1879, in book 1, page 100, of the records of said Gallatin county.

Said deed was then read in evidence, and vests in said Rosa G. Black the title of said Toole to said property.

The witness then stated the conversation between himself and said Leander M. Black before the time the deed of said Black
37 to said Toole was delivered, and the plaintiff objected to the same. Whereupon the court sustained said objection, and the same was excluded.

The witness then testified:

The consideration of the deed from said Black to me was an account for legal services which the said Black was owing me.

The defendants then read the deposition of Leander M. Black, to wit:

Deposition.

In the District Court, First Judicial District, in & for Gallatin County, Montana Territory.

NELSON STORY
vs.
MADISON M. BLACK and ROSA G. BLACK.

Interrogatories.

Int. 1. What is your name, age, and where do you reside at the present time?

Int. 2. Are you acquainted with the plaintiff, Nelson Story; if so, how long have you known him, and at what place or places and when did you become acquainted with him and where?

38 Int. 3. Are you acquainted with the defendants, Madison M. Black and Rosa G. Black; if so, how long have you known them and each of them?

Int. 4. What relation do you sustain to the defendants and each of them?

Int. 5. State, if you know, what relation the said defendants, Madison M. Black and Rosa G. Black, sustain to each other.

Int. 6. If your answer to 5th interrogatory be that the defendants are husband and wife, you will state, if you know, when and where they intermarried and whether or not you were present at their marriage.

Int. 7. You will state whether or not you, at the time or about the time of the marriage of the said defendants, made and executed to the said defendants or either of them a deed to certain real estate in the town of Bozeman City, in the county of Gallatin, Territory of Montana; if so, will you give a description of the said real estate; where located in said city; the general designation of the said premises; also the consideration of said — or in said deed mentioned; also whether or not said deed was recorded as required

39 by law, and, if not, why it was not so recorded, and your motives and intentions for making and executing the deed aforesaid? You will please state fully.

Int. 8. If your answer to the 7th interrogatory — that you made and executed to the defendant, Rosa G. Black, a deed to certain real property at the time mentioned in said interrogatory, you will state whether or not the said real property was in any way incumbered at the time said deed was made and executed as aforesaid, and, if not incumbered, you will state whether or not, at the time last aforesaid, your liabilities exceeded your assets at said time, and if your assets at the said time exceeded your liabilities, you may state in what amount as near as you can, and please state fully.

Int. 9. You will state, if you know, who entered into and took possession of the real property deeded as aforesaid immediately after the execution of said deed.

Int. 10. If your answer be, to the 9th interrogatory, that the said defendants entered into and took possession of the real property deeded by you as aforesaid after the execution of said deed,
40 you will state how long they retained the possession of the same.

Int. 11. What, if any, business transaction did you afterwards have with the said defendants, with regard to the real property so deeded by you as aforesaid, and any other real property you owned in the town of Bozeman City, Gallatin county, Montana Territory?

Int. 12. If, in answer to the 11th interrogatory, you state that you bartered and exchanged certain real property, to wit, lots No-. 16 & 17 with the improvements thereon and the appurtenances belonging thereto, in block A of Black's addition to the town of Bozeman City, Gallatin county, Montana Territory, and known as the Randall property, with the said defendants for the real property deeded by you aforesaid, you will state the time and terms of such barter and exchange.

Int. 13. At the time you made the barter and exchange with the defendants aforesaid was the last described property in any way incumbered, and, if so, to what extent, and the nature and kind of such incumbrance?

41 Int. 14. After the barter and exchange of the real estate hereinafter mentioned, between yourself and the said defendants, what, if anything, did you do with the real estate you first deeded to the defendant, Rosa G. Black?

Int. 15. State whether or not you ever deeded any real estate in Bozeman City, Gallatin county, Montana Territory, to E. W. Toole; if so, state as near as you can what real property was included in the said deed to said Toole, and what, if any, real property so included you reserved from the effects of said deed, and what you said to the said E. W. Toole with regard to it. Please state fully.

Int. 16. You will please state any other facts with which you are acquainted with regard to the above-entitled action that will be of benefit to the defendants upon the trial thereof.

Cross-interrogatories to be propounded on the part of the plaintiff to Leander M. Black, a witness interrogated in chief by the defendants.

Cross-int. 1. If, in your answer to the seventh interrogatory of
42 the defendants, you testify to the effect that you did make and execute to the defendants or either of them a deed, state now the nature of said deed, whether quit-claim or warranty, by whom it was drawn or prepared, and what date it bore; whether you signed said deed with your own hand; whether you signed it alone or whether your wife signed it also, and in whose presence and where, in what room or place the same was signed by you, and where, if at all, it was signed by your wife. State if you acknowledged said deed; also if your wife acknowledged it, and if you did give the name of the officer before whom you each acknowledged it, and the date the same was acknowledged, and at what place.

State who was named in the deed as grantee or grantees, giving the names used therein. State what disposition was made of said deed; where and in whose hands has it been since the time you signed it. State fully. State whether it was ever in the possession of the defendants or either of them. If it was, state when and where and for how long a time, and when they or either of them became dispossessed of it, and where and in whose hands it is now.

43 Give a particular description of the property (real estate) mentioned in said deed; describe the same by metes and bounds as set forth in said deed.

Cross-int. 2. At the time of the execution of the alleged deed, and for some time thereafter, did not your wife and family reside in or occupy the premises in said deed described; if yes, how long did they occupy said premises after the date of the alleged deed?

Cross-int. 3. Did you not at various times claim to be the owner of said real estate described in said alleged deed after the said date thereof, and did you not after said date treat it as your own and exercise acts of ownership over it; if yes, what acts did you do upon and with said property after said date and prior to the alleged barter or exchange mentioned in the 12th interrogatory of the defendants, tending to show that the said real estate was your own? State fully.

Cross-int. 4. Did not your furniture, with which the house was furnished, remain in the house on the premises described in the alleged deed from the date of said deed until you sold and

44 conveyed the premises to one Koch, and did you not sell to him, Koch, with the house, the same furniture with which the house was furnished at the date of said alleged deed to the defendants; and was yours the only furniture with which the house was furnished during that interval? If no, state in what particular the furniture with which the house was furnished at the date of the alleged deed differed from the furniture sold by you to said Koch with the premises.

Cross-int. 5. During the interval between the alleged deed and the sale of the premises to Koch were not the taxes upon the premises paid by you, or your agent for you, and as your own property?

Cross-int. 6. During the interval of time referred to, or at any time, did the defendants or either of them have the exclusive control and possession of the premises described in the alleged deed, in their own right and independent of your right, title, claim, and interest, or otherwise than agent? If yes, state how long and between what dates.

45 Cross-int. 7. If, in answer to the 13th interrogatory of the defendants, you say that you did deed any real property in Bozeman to one E. W. Toole, state where you were at the time you signed the deed, and whether said Toole was present when you signed it. If you did reserve any property from the operation of said deed where were you when the said reservation was made—when was it made, and at what date, and in whose presence? Is the said reservation expressed in the said deed, and if not, why not, and at what time and place had you last seen and conversed with Mr. Toole upon

the subject of said deed prior to the date of the execution of the deed to him?

Ans. to Int. No. 1. Name is Leander M. Black; age, 49 years; reside in Washington city, District of Columbia, at the present time.

Ans. to Int. No. 2. I am acquainted with plaintiff, Nelson Story; have known him since 1869; first became acquainted with him at Bozeman, Montana Territory, I think, in 1869.

Ans. to Int. No. 3. I am acquainted with the defendants,
46 Madison M. Black and Rosa G. Black; have known Rosa G. since about 1869, and Madison M. is my son; have known him since he was born.

Ans. to Int. No. 4. Madison M. is my son, and Rosa G. is his wife.

Ans. to Int. No. 5. Husband & wife.

Ans. to Int. No. 6. They were married at Bozeman, M. T., in Aug., 1875, I think. I was present at their marriage.

Ans. to Int. No. 7. I was the owner of a lot on corner of Babcock & Black streets, Bozeman, M. T.; I think in block B. It had a frame cottage on it, which at the time of the wedding I gave to them as a wedding present. Notice of this fact was published in one of the Helena papers (I think the Herald) as among the wedding presents. I do not remember whether I made a conveyance to them of said property by deed at that time or not. They immediately after the wedding took possession of said house and premises and occupied the same until about the summer of 1877. The consideration for this present was the natural love and affection
47 I felt for my son. If there was no deed executed and recorded it was simply neglect on my part, as I could have made it at any time if called upon, but my attention was never called to it. The intent of the gift was to convey the property absolutely, and I so regarded it as conveyed.

Ans. to Int. No. 8. The property was not incumbered at the time the gift was made; my liabilities did not exceed my assets; I can safely say that I was then worth at least one hundred thousand dollars over and above all debts, liabilities, and exemptions whatever.

Ans. to Int. No. 9. Immediately or shortly after the gift, as I have before stated, they, the defendants took possession and occupied it as a residence.

Ans. to Int. No. 10. They retained possession up to some time in the summer of 1877.

Ans. to Int. No. 11. Some time in the summer of 1877 I made a proposition to them to exchange a house and two corner lots, known as the Randall property, in Bozeman, for the one they occupied, and I told Rosa, one of the defendants, at the time that if they would exchange I would deed the premises known as the
48 Randall property to her individually, giving the title in her name, which I neglected afterwards to do. She and Madison were both satisfied to do this.

Ans. to 12th Int. It was simply an exchange of properties which we all considered of equal value, and there was no difference paid either way.

Ans. to Int. No. 13. I don't know that it was incumbered a single dollar at that time. I supposed it to be clear of everything, with no lien or demand of any kind against it.

Ans. to Int. No. 14. After the exchange I sold the first piece (that is the piece given as a wedding present) to Peter Koch, I think. The records of Gallatin county will undoubtedly show this transfer.

Ans. to Int. No. 15. I did convey by deed certain property in Bozeman to E. W. Toole; I think some time in 1878; I am not positive as to the date; cannot state all the parcels of property conveyed to him by said deed. The understanding with and the instructions I gave to Mr. Toole at the time this conveyance was
49 made to him, was that this property in controversy should be by him (Mr. Toole) conveyed to Rosa G. Black; at the time this deed to Toole was executed I was in Helena, Montana; Toole was at the time the deed was executed in Helena, and I then told him this Randall property belonged to Rosa G. Black, and requested him to convey it to her, which, I think, he did shortly afterwards. I am quite positive that the Randall property was included in this deed to Toole, who was my attorney. The deed will show for itself.

Ans. to Int. No. 16. Shortly after the defendants took possession of this Randall property the- made considerable improvements thereon by building an addition to the house at considerable expense.

Ans. to cross-int. No. 1. I have no recollection of having ever made or executed any deed to the first-named pi-ce of property, except to Koch, subsequent to the exchange referred to in my direct examination. This transfer to Koch was made some months subsequent to the exchange referred to in my direct examination.

50 Ans. to cross-*ex.* No. 2. My wife and family were present at the wedding of the defendants. Prior to the wedding my wife and family resided for some months at the North Pacific Hotel, Bozeman, and were residing there at the time of the marriage of said defendants; do not remember that my family occupied the house a single day after the intermarriage of defendants; they did occupy the house for a short time prior to taking up residence in the hotel.

Ans. to cross-int. No. 3. From the time of the gift to the defendants up to the time of the exchange made with them for the Randall property I did not exercise any acts of ownership over the property first mentioned.

Ans. to cross-int. No. 4. The furniture with which the house was first furnished was all of my own, but part of it was moved to the hotel before the marriage of the defendants. They brought in their own furniture just after the marriage, but a portion of my furniture remained there all the time, and was used by my son and his wife as their own, they having exclusive occupancy of the house;
51 cannot state the particulars as to the furniture further than as above mentioned.

Ans. to cross-int. No. 5. I cannot state as to the payment of taxes, as I have no recollection on this point. If they were paid by me I

paid them as a father would for a son, desiring to assist him and not as owner.

Ans. to cross-int. No. 6. From the time of the gift (at the time of the marriage) until the exchange was made of the property for the Randall property my son and his wife, the defendants herein, had the exclusive control and possession of the property given them at the time of the marriage in their own right, and independent of any right, title, claim, and interest or otherwise in myself; the precise dates I cannot now give.

Ans. to cross-int. No. 7. The deed to E. W. Toole was executed in Helena, Montana; he was present at the time. I do not remember that any one else was present. For fuller answer see my answer to direct interrogatory No. 15.

The defendants here rested.

52 The plaintiff in rebuttal called NELSON STORY, who testified:

"I know the parties and Leander M. Black. L. M. Black has always made his home at the Koch house while he was in Bozeman. L. M. Black's family was in this house in the spring of 1875, and lived there several months. L. M. Black was in Bozeman in 1875, and went east on the fifth day of January, 1876. After the wedding of the defendants L. M. Black slept in the Koch house and sometimes boarded there. L. M. Black furnished a part of the house, and always had some furniture there while the defendants lived there. I was absent from Bozeman when the defendants were married. I went away from the Territory April 24, 1876, and returned in April, 1877. L. M. Black was here in the summer of 1877, and had possession of the Koch house and occupied it until November, 1877. L. M. Black went east in the fall of 1877."

The plaintiff then propounded to said witness the two questions which are contained in plaintiff's exceptions numbered 3
53 and filed in this action. Whereupon the defendants objected; and the court saved the following exception thereon by the plaintiff, to wit:

Plaintiff's Exception No. 3.

In the District Court, First Judicial District, County of Gallatin, Montana Territory.

NELSON STORY, Plaintiff,
vs.
MADISON M. BLACK and ROSA G. BLACK, Defendants.

Be it remembered that upon the trial of said action the plaintiff, to maintain the issues on his part, propounded to Nelson Story, the plaintiff herein, the following questions:

1. What notice or knowledge did you have of any right or title of the defendants, or either of them, to the property described in the pleadings before you bought the property described in the complaint?

2. What conversations did you have with Leander M. Black concerning the ownership of the property described in the answer as Black's residence after the marriage of Madison M. Black, and before July 1, 1877?

To the asking of said questions the defendants objected. Whereupon the court sustained the objection, and to the action of the court in sustaining the objection to each of said questions the plaintiff at the time excepted, and asks that this his bill of exceptions be signed and sealed, which is done accordingly.

(Signed) E. J. CONGER, *Judge.* [L. S.]

Add after word complaint, on 3rd page of exception, "I only claim title as an attaching creditor, and as purchaser under a judgment recovered as such, and knew that defendants and their mother-in-law were living in it at the time of attaching and purchasing the said property."

(Signed) E. J. CONGER, *Judge.*

From about January, 1876, to November, 1877, Leander M. Black was indebted to me between thirteen and fourteen thousand dollars. In July, 1877, said Black still owed me this amount and about $2,500.00 more. I attached the property in controversy in July, 1878. I had an attachment on the Koch property in May, 1878. I released said attachment without any moneyed consideration on the Koch property, as L. M. Black had sold the same to Peter Koch. I did this in order that Peter Koch could get a clear title. After the release of my attachment L. M. Black conveyed said property to Peter Koch.

DAVIS WILLSON was then called and testified:

"I knew the Randall house, and lived there from April 13, 1877, to July 24, 1877. I got possession of the house from James G. Dow, the agent of said L. M. Black, and paid said Dow as such agent the rent during said time."

Mrs. PERKINS RUSSELL was then called and testified:

I came to Bozeman September 8, 1877, and know the defendants. I occupied the Koch house from October, 1877, to May 1, 1878, and rented it from Leander M. Black.

The plaintiff then propounded to the witness the question contained in the plaintiff's exceptions numbered 4 and filed in this action. Whereupon the defendants objected and the court sustained the objection, and the plaintiff excepted and saved the following bill of exceptions, to wit:

Plaintiff's Exception No. 4.

In the District Court, First Judicial District, in & for Gallatin County, Montana Territory.

NELSON STORY *vs.* MADISON M. BLACK and ROSA G. BLACK.

Exception No. 4.

Be it remembered that upon the trial of said action the plaintiff, to show that Leander M. Black exercised acts of ownership over the property described in the complaint after July, 1877, propounded to Mrs. Perkins Russell, a witness of lawful age, the following question: "What did you hear Leander M. Black say about selling or leasing said property in October, 1877?" To which question the defendants objected. Whereupon the court sustained said objection, and to the action of the court in sustaining said objection the
57 plaintiff at the time excepted, and asks that this his bill of exceptions be signed and sealed, which is done accordingly.
(Signed) E. J. CONGER, *Judge.* [L. S.]

I had several conversations with the defendant, Rosa G. Black, about the ownership of the Koch property. She said the property was not a gift to her, and she never expected it, and that the girls—the daughters of L. M. Black—wanted it to appear in the newspapers as a gift to her, and that L. M. Black had nothing to do with it. When I occupied the Koch house the furniture belonged to L. M. Black.

In October or November, 1877, L. M. Black offered to sell or rent me the Randall house, and took me to the house and showed it to me; he offered to put on an addition.

Cross-examined by defendants:

I had some trouble with Rosa G. Black. In October or November, 1877, Mrs. Hunter came to the Koch house to see L. M. Black and lease the Randall House, the property in controversy.

L. M. Black started for Washington November 5, 1877.

58 GEORGE W. WAKEFIELD was called and testified:

Leander M. Black came here the last day of June, 1877. He gave me the use of the Koch house from the middle of July, 1877, to August, 1877. He sometimes lodged at the hotel, but when in Bozeman L. M. Black generally slept in the Koch house.

The judgment docket of the above-entitled court was then offered in evidence, and showed that Leander M. Black, on July 1, 1877, owed to persons who commenced suits, in May and subsequent thereto, in the year 1878, against him in said court, $20,311.69; that a judgment in favor of Peters & Calhoun Company was rendered against said Black, May 13, 1879, for $2,060, and remains wholly unsatisfied, and that a judgment in favor of H. C. Geisse was rendered against said Black, May 13, 1879, for $926.46, and that the sum of $509.46 remains unsatisfied.

Mrs. GEORGE W. WAKEFIELD was then called and testified:

"I know Leander M. Black. What little time he staid in Bozeman he boarded and roomed with us a part of the time, and
59 a part of the time he roomed and boarded with his children, the defendants. I was at the wedding of the defendants, and about 150 guests were there. I had a conversation with Rosa G. Black, one of the defendants, when she was living at the Koch house, about a deed to the property. Rosa said she had asked L. M. Black for a deed to it, and he told her that when he deeded it to any one he would deed it to her. L. M. Black had some furniture in the Koch house. I supposed it was his while the defendants lived there. I was in the house when Mrs. Russell, the witness, occupied it, and saw this furniture. I supposed it to be L. M. Black's. L. M. Black lived at the Koch house before and after the marriage of the defendants, occasionally."

Cross-examined by defendants:

I cannot say whether or not the conversation with Rosa, in reference to the deed from L. M. Black, was before or after the exchange of the two pieces of property. My impressions now are that this conversation took place at Mrs. Bailey's after the exchange. We took possession of the Koch property and used it in con-
60 nection with the hotel for lodgers late in July, 1877; maybe it was the first of August; at any rate it was after the exchange, in the summer of 1877.

T. J. DAWES was then called and testified:

"In August, 1877, Leander M. Black offered to sell me the Randall property for $1,200.00. He made this offer while he was in the Koch house."

Mrs. ALFRED H. MYERS was then called and testified:

I know the defendants; I was living in the Koch house in the fall of 1877, and between Christmas and New Year; Madison M. Black, one of the defendants, came to the house and said to my mother, "You get out of my house at once." My mother replied that she rented the house from Leander M. Black, who was the owner of it. He said, "This house belongs to me."

Cross-examined by defendants.

Soon after this conversation a suit was brought in the name of Leander M. Black against my mother.

Here the plaintiff rested.

MADISON M. BLACK was then called by the defendants and testified:

61 "In February, 1878, I asked Mrs. Russell to move out of the Koch house, and demanded possession for Leander M. Black."

Here the defendants rested, and the foregoing statement contains all the evidence that was offered upon the trial of the action.

The cause was then argued by counsel.

Before and at the time of the submission of the cause to the court the plaintiff requested the court to make findings in writing, and such request was entered in the minutes of the court.

And said plaintiff on the twenty-ninth day of April, A. D. 1881, in open court, did file his request in writing for the court to make certain findings, to wit:

Plaintiff's Request for Findings.

In the District Court, First Judicial District, in & for Gallatin County, Montana Territory.

NELSON STORY
vs.
MADISON M. BLACK & ROSA G. BLACK.

62 And now comes the plaintiff and requests the court to make the following findings:

1. That on the thirty-first day of August, A. D. 1875, and for some time prior thereto, Leander M. Black was the owner and possessor of the property described in the complaint and answer and replication in this action.

2. That said Leander M. Black never sold, assigned, surrendered, declared, created, or granted any estate or interest in the property described in the pleadings in this action by and deed or conveyance in writing from the thirteenth day of August, A. D. 1875, until the seventeenth day of May, 1878, when said Black, by a proper deed, sold and conveyed to Peter Koch the following property, to wit: Commencing on or at the northwest corner of block B in Black's addition to the town of Bozeman, and thence running east seventy feet, thence south one hundred and fifty feet, thence west seventy feet, thence north one hundred and fifty feet to the place of beginning, the same fronting seventy feet on Babcock street, on the south side thereof, and known as Black's residence; and

63 that said Black on the 3rd day of May, A. D. 1879, made, and on the tenth day of May, 1879, acknowledged, a proper deed, and thereby sold and conveyed to Edwin W. Toole the property in controversy in this action, to wit: lots sixteen and seventeen in block A of Black's addition to said town of Bozeman; and that said Toole, on the twenty-sixth day of June, A. D. 1879, made, and on the twenty-eighth day of June, A. D. 1879, acknowledged, a proper deed, and thereby conveyed to the defendant, Rosa G. Black, his right, title and interest is said last-mentioned property.

3. That the plaintiff commenced an action against said Leander M. Black on the twenty-eighth day of February, A. D. 1878; that a writ of attachment therein was regularly levied upon the property in controversy on the twelfth day of July, A. D. 1878; that a judgment was therein entered for plaintiff and against said Leander M. Black on the twelfth day of May, A. D. 1879; that an execution to enforce said judgment was issued out of the office of the clerk of the district court of the first judicial district of Montana Territory

within and for Gallatin county, in which said proceedings
64 had been had, on the twenty-fifth day of May, A. D. 1879; that the sheriff of said Gallatin county on the twenty-seventh day of June, A. D. 1879, sold said property in controversy in this action under said execution to the plaintiff, and delivered to the plaintiff a certificate of the sale thereof, bearing date the twenty-seventh day of June, A. D. 1879, and that on the twenty-ninth day of December, A. D. 1879, said sheriff of said Gallatin county made, executed, and delivered to the plaintiff a good and sufficient deed, whereby he sold and conveyed to the plaintiff all the right & interest of said Leander M. Black in and to the property in controversy in this action on the twelfth day of July, A. D. 1878.

4. That the plaintiff demanded the possession of the property described in the complaint on the twenty-fourth day of January, A. D. 1880, of the defendants, and that the defendants refused to deliver the possession thereof to plaintiff, and still retain the same.

5. That the reasonable value of the rents of said property in the complaint described has been fifteen dollars per month since
65 November 1, A. D. 1877.

6. That said Leander M. Black, on July 1, A. D. 1877, was indebted in the sum of $20,311.69, and that judgments were entered in said district court therefor against said Black in A. D. 1877, 1878, and 1879, and that there remains unsatisfied the following of said judgments, to wit: A judgment for Peters & Calhoun Company, founded upon a promissory note, dated August 8, 1876, and entered May 13, 1879, for the sum of $2,060.00, and a judgment for H. C. Geisse, founded upon a promissory note dated August 16, 1876, and entered May 13, 1879, for the sum of $509.46, besides the interest on said sums.

7. That said defendant, Rosa G. Black, was absent from said Montana Territory eleven months from November, A. D. 1876, until October, A. D. 1877, and that said defendant, Madison M. Black, was absent from said Gallatin county during the same period, excepting about the first ten days in July, A. D. 1877.

8. That said defendants, about the first day of January, A. D. 1878, entered into the possession of the property in controversy.

66 And afterwards, to wit, on the third day of May, A. D. 1881, the court filed in this action the following findings, and conclusions of law, and judgment, to wit:

Findings, Conclusions of Law, & Judgment of the Court.

In the District Court, First Judicial District, in & for Gallatin County, Montana Territory.

NELSON STORY *vs.* MADISON M. BLACK and ROSA G. BLACK.

Findings, &c., of court.

Be it remembered that on the 28th day of April, A. D. 1881, the above-entitled cause was submitted to the court, a jury having been

expressly waived. After hearing the evidence in the cause the court made the following findings, to wit:

1. That on the 31st day of August, A. D. 1875, the said Leander M. Black, father of defendant, Madison M. Black, executed to the defendant, Rosa G. Black, a deed to what is known as the Koch property, which deed was delivered by placing it in an envelope
67 and depositing the same upon the piano among the bridal presents given to the bride on the eve of her marriage, in consideration of the natural love and affection of a parent to a child.

2. That by virtue of said deed said defendants entered upon said property, went into possession and occupation thereof, and made valuable improvements thereon.

3. That they remained so in possession and occupation of the same until about the 1st day of July, A. D. 1877, when, by virtue of an exchange of property with the said L. M. Black, they in pursuance thereof entered into the actual possession and occupancy of what is known as the Randall property, and have ever since held possession of and occupied the same.

4. This exchange of the Koch property for the Randall property was made by the parties in good faith and accepted by defendants and the said Leander M. Black as a *bona fide* transfer of said property and all the rights, title, and interest therein from one party to the other.

5. That no deed or memorandum was made in writing at
68 the time of the exchange and transfer as aforesaid by the said parties.

6. That after receiving possession of the said property, under said exchange and transfer, the said defendants on account thereof, and relying in good faith upon the same, made valuable and permanent improvements upon the said property and now occupy it.

7. That after said exchange and transfer the said Leander M. Black conveyed by deed to E. W. Toole the said Randall property in trust for these defendants, and the said E. W. Toole, in pursuance of his trust, conveyed by deed the same to said defendants, and that soon after such exchange of property the said Leander M. Black conveyed the property so originally deeded to defendants and by them exchanged as aforesaid to one Peter Koch.

8. That said Leander M. Black, at the time of making said deed of gift to defendants, was worth about one hundred thousand dollars, with small, if any, indebtedness.

9. That said Story thereafter became a creditor of said Leander M. Black, and upon a judgment in his favor against him *and*
69 sold the property under an execution issued thereon and became the purchaser of the same at such sale and received a sheriff's deed therefor; that said Story had actual notice of the possession of said property by defendants, and that at the time of the sale said sheriff read to the bidders, and in the hearing of said plaintiff and those present, a notice setting out the rights of said defendants in the premises then to be sold, being that in controversy.

And the court find as conclusions of law as follows, to wit:

1. That the actual possession and occupancy of said property by the defendants was notice to plaintiff of all their rights and equities in the premises.

2. That the transfer of said property to defendants, their occupancy, possession, and improvement of the same prior to any right accruing to plaintiff therein, gives them a superior equity and right to the same as against said plaintiff.

3. That the transfer or conveyance of the said property by said Black to said Toole and the conveyance thereof by said Toole to defendants in pursuance of his trust united the legal title with
70 the equitable title theretofore vested in the defendants, and that by reason thereof they are entitled to recover in this action, and judgment is accordingly ordered.

Given under my hand and seal this 3rd day of May, A. D. 1881.

E. J. CONGER, *Judge.* [SEAL.]

And to the action of the court in filing said findings and conclusions of law, and entering judgment thereon, and in refusing to make the findings so requested by the plaintiff, the plaintiff at the time excepted, and saved the following bill of exceptions, to wit:

Plaintiff's Exception No. 5.

In the District Court, First Judicial District, in & for the County of Gallatin, Montana Territory.

NELSON STORY *vs.* MADISON M. BLACK & ROSA G. BLACK.

EX. No. 5.

Be it remembered that on this third day of May, A. D. 1881, the court filed in said action findings of fact and conclusions of law, to wit:

71 NELSON STORY, Plaintiff,

vs.

MADISON M. BLACK and ROSA G. BLACK, Defendants.

Be it remembed that on this the 28th day of April, A. D. 1881, the above-entitled cause was submitted to the court, a jury having been expressly waived. After hearing the evidence in the cause the court makes the following findings, to wit:

1. That on the 31st day of August, 1875, the said Leander M. Black, father of defendant, Madison M. Black, executed to the defendant, Rosa G. Black, a deed to what is known as the Koch property, which deed was delivered by placing it in an envelope and depositing the same upon the piano among the bridal presents given to the bride on the eve of her marriage in consideration of the natural love and affection of a parent to a child.

2. That by virtue of said deed said defendants entered upon said property, went into possession and occupation thereof, and made valuable improvements thereon.

72 3. That they remained so in possession and occupation of the same until about the 1st of July, A. D. 1877, when, by virtue of an exchange of property with the said L. M. Black, they in pursuance thereof entered into the actual possession and occupancy of what is known as the Randall property, and have ever since held possession of and occupied the same.

4. This exchange of the Koch property for said Randall property was made by the parties in good faith and accepted by defendants and the said Leander M. Black as a *bona fide* transfer of said property, and all the right, title, and interest therein from one party to the other.

5. That no deed or memorandum was made in writing at the time of the exchange and transfer as aforesaid by the said parties.

6. That upon receiving possession of the said property under said exchange and transfer said defendants, on account thereof, and relying in good faith upon the same, made valuable and permanent improvements upon said property and now occupy it.

7. That after said exchange and transfer the said Leander
73 M. Black conveyed by deed to E. W. Toole the said Randall property in trust for these defendants, and said E. W. Toole, in pursuance of his trust, conveyed by deed the same to said defendants, and that soon after said exchange of property the said Leander M. Black conveyed the property so originally deeded to defendants, and by them exchanged as aforesaid, to one Peter Koch.

8. That said Leander M. Black at the time of making said deed of gift to defendants was worth about one hundred thousand dollars, with small, if any, indebtedness.

9. That said Story thereafter became a creditor of said Leander M. Black, and upon a judgment in his favor against him *and* sold the property under an execution issued thereon and became the purchaser of the same at such sale and received a sheriff's deed therefor; that said Story had actual notice of the possession of said property by defendants, and that at the time of the sale said sheriff read to the bidders and in the hearing of said plaintiff and those present a notice setting out the rights of said defendants in the premises then to be sold, being that in controversy.

74 And the court finds as conclusions of law, as follows:

1. That the actual possession and occupancy of said property by the defendants was notice to plaintiff of all their rights and equities in the premises.

2. That the transfer of said property to defendants, their occupancy, possession, and improvement of the same, prior to any right accruing to plaintiff therein, gives them a superior equity and right to the same as against said plaintiff.

3. That the transfer or conveyance of the said property by said Black to said Toole and the conveyance thereof by said Toole to defendants in pursuance of his trust united the legal title with the equitable title, theretofore vested in defendants, and that by reason thereof they are entitled to recover in this action, and judgment is accordingly ordered.

Given under my hand and seal this 3rd day of May, A. D. 1881.
E. J. CONGER, *Judge.* [L. S.]

That the plaintiff at the time excepted to each of said findings, excepting that numbered 5th, and to each of said conclusions
75 of law, on the ground that the same are defective and do not cover the material issues in said action, and that the court erred in its conclusions of law upon said findings.

That the plaintiff, on the twenty-ninth day of April, A. D. 1881, filed his request in writing with the clerk of said court, requesting said court to make the following findings on the issues in said action, to wit:

NELSON STORY, Plaintiff,
vs.
MADISON M. BLACK and ROSA G. BLACK, Defendants.

And now comes the plaintiff and requests the court to make the following findings:

1. That on the thirty-first day of August, 1875, and for some time prior thereto, Leander M. Black was the owner and possessor of the property described in the complaint and answer and replication in this action.

2. That said Leander M. Black never sold, assigned, surrendered, declared, created, or granted any estate or interest in the prop-
76 erty described in the pleadings in this action by any deed or conveyance in writing from the thirtieth day of August, A. D. 1875, until the seventeenth day of May, A. D. 1878, when said Black by a proper deed sold and conveyed to Peter Koch the following property, to wit: Commencing on or at the northwest corner of block B in Black's addition to the town of Bozeman, and thence running east seventy feet, thence south one hundred & fifty feet, thence west seventy feet, thence north one hundred and fifty feet to the place of beginning; the same fronting seventy feet on Babcock street, on the south side thereof, and known as Black's residence; and that said Black, on the third day of May, A. D. 1879, made, and on the tenth day of May, A. D. 1879, acknowledged, a proper deed, and thereby sold and conveyed to Edwin W. Toole the property in controversy in this action, to wit: lots sixteen and seventeen in block A in Black's addition to said town of Bozeman; and that said Toole, on the twenty-sixth day of June, A. D. 1879, made, and on the twenty-eighth day of June, A. D. 1879, acknowledged,
77 a proper deed, and thereby conveyed to the defendant, Rosa G. Black, his right, title, and interest in said last-mentioned property.

3. That the plaintiff commenced an action against said Leander M. Black on the twenty-eighth day of February, A. D. 1878; that a writ of attachment therein was regularly levied upon the property in controversy on the twelfth day of July, A. D. 1878; that a judgment was therein entered for plaintiff and against said Leander M. Black on the twelfth day of May, A. D. 1879; that an execution to enforce said judgment was issued out of the office of the clerk of the dis-

trict court of the first judicial district of Montana Territory, in and for Gallatin county, in which said proceedings had been had, on the twenty-fifth day of May, A. D. 1879; that the sheriff of said Gallatin county, on the twenty-seventh day of June, A. D. 1879, sold said property in controversy in this action under said execution to the plaintiff, and delivered to the plaintiff a certificate of the sale thereof bearing date the twenty-seventh day of June, A. D. 1879, and that on the twenty-ninth day of December, A. D. 1879, said sheriff of said Gallatin county made, executed, and delivered to the plain-
78 tiff a good & sufficient deed, whereby he sold and conveyed to the plaintiff all the right and interest of said Leander M. Black in and to the property in controversy in this action on the twelfth day of July, A. D. 1878.

4. That the plaintiff demanded the possession of the property described in the complaint on the twenty-fourth day of January, A. D. 1880, of the defendants, and that the defendants refused to deliver the possession thereof to the plaintiff and still retain the same.

5. That the reasonable value of the rents of said property in the complaint described has been fifteen dollars per month since November 1, A. D. 1877.

6. That said Leander M. Black, on July 1, A. D. 1877, was indebted in the sum of $20,311.69, and that judgments were entered in said district court therefor against said Black in A. D. 1877, 1878, and 1879, and that there remain unsatisfied the following of said judgments, to wit: A judgment for Peters & Calhoun Company, founded upon a promissory note dated August 8, 1876, and entered May 13, 1879, for the sum of $2,060, and a judgment for H. C. Geisse, founded upon a promissory note dated August 16, 1876, and entered May 13, 1879, for the sum of $509.46, besides the interest on said sums.

79 7. That said defendant Rosa G. Black was absent from said Montana Territory eleven months, from November, A. D. 1876, until October, A. D. 1877, and that said defendant Madison M. Black was absent from said Gallatin county during the same period, excepting about the first ten days in July, A. D. 1877.

8. That said defendants, about the first day of January, A. D. 1878, entered into the possession of the property in controversy.

That the court refused to find any of said findings, and to the action of said court in so refusing to make any of said findings so requested by the plaintiff the said plaintiff at the time excepted, and that thereafter the court entered judgment on said findings and conclusions, to wit:

And to the entry of said judgment for the defendants the plaintiff at the time excepted. Wherefore the plaintiff prays that this his bill of exceptions be signed and sealed, which is done accordingly.

E. J. CONGER, *Judge.* [L. S.]

Specifications of particulars in which the evidence is insufficient to sustain the findings and decision of the court, to wit:

80 1. The first finding and portions of the second, third, and eighth findings of the court, to the effect that the deed to the Koch property had been executed by Leander M. Black to Rosa G. Black, are unsustained by the evidence, for the reason that no witness ever saw such a deed; that Leander M. Black does not testify that he ever executed the deed, and that the defendants do not testify that they, or either of them, ever received the deed.

2. That the portion of the third finding to the effect that the defendants remained in the occupation of the Koch property until July 1, 1877, is sustained by the evidence, for the reason that said defendants were absent from said Gallatin county from October, 1876, until after July 1, 1877, and Leander M. Black was an occupant of said property during said time while he was in Bozeman.

3. That the portion of the third finding to the effect that the defendants entered into the occupation or possession of the Randall property about July 1, 1877, is unsustained by the evidence, for the reason that the defendants testify that they did not occupy the same until about January 1, 1878, and Leander M. Black ex-

81 ercised over it acts of ownership by trying to sell or lease it to the witness, Mrs. Russell, and T. J. Dawes, in October and November, 1877.

4. That the portion of the seventh finding to the effect that E. W. Toole received from Leander M. Black a deed of said Randall property in trust for the defendants is not sustained by the testimony of any witness.

5. That the portion of the ninth finding to the effect that a notice read at the sheriff's sale set out the rights of the defendants is unsustained by the evidence, for the reason that the notice is contained in this statement upon page — and does not set out said rights.

Specification of Errors of Law on Which the Plaintiff Will Rely.

1. The court in admitting in evidence the testimony of the witness- for the defendants, Madison M. Black, Rosa G. Black, James D. Chesnut, L. J. P. Morrill, Robert P. Vivion, A. Lamme, and C. P. Blakely, which is contained in plaintiff's said exception numbered 1 and upon page — of this statement.

2. The court erred in admitting in evidence the testimony

82 of Madison M. Black, a witness for the defendants, which is contained in plaintiff's said exception numbered 2, and upon page — of this statement.

3. The court erred in sustaining the objections of the defendants to each of the questions propounded to Nelson Story by the plaintiff, which are contained in plaintiff's said exception numbered 3 and upon page — of this statement.

4. The court erred in sustaining the objection of the defendants to the question propounded to the witness, Mrs. Perkins Russell, by the

plaintiff, which is contained in the plaintiff's said exception numbered 4 and upon — page of this statement.

5. The court erred in refusing to file any of the findings requested by said plaintiff, which are contained upon page — of this statement and in plaintiff's exception numbered 5.

6. The court erred in each of the conclusions of law filed herein, and numbered 1, 2, and 3, which are contained in plaintiff's exceptions numbered 5 and upon page — of this statement.

7. The court erred in filing the findings herein numbered 1, 2, 3, 4, 6, 7, 8, and 9, which are contained in plaintiff's exceptions
83 numbered 5 and upon page — of this statement.

8. The court erred in entering judgment for the defendants upon the findings and conclusions of law, which are contained in plaintiff's exceptions numbered 5 and upon page — of this statement.

Received a copy of the within statement on the plaintiff's motion for a new trial this 4th day of May, A. D. 1881.

(Signed) E. W. TOOLE &
VIVION & PIERCE,
Att'ys for Defendants.

I hereby acknowledge service of a copy of the within amendments to plaintiff's statement on motion for a new trial, dated this 11th day of May, A. D. 1881.

(Signed) J. J. DAVIS,
Of Counsel for Pl'ff.

The foregoing statement and amendments are allowed. I certify the statement as correct.

(Signed) E. J. CONGER, *Judge.*

84 *The Plaintiff's Notice of Intention to Move for a New Trial.*

In the District Court, First Judicial District, in & for Gallatin County, Montana Territory.

NELSON STORY *vs.* MADISON M. BLACK *et al.*

To Madison M. Black and Rosa G. Black, the above-named defendants, and their attorneys of record, Mess. Vivion & Pierce and E. W. Toole:

Take notice that the plaintiff, on the fifth day of May, A. D. 1881, at the court-room of said court in Bozeman, county aforesaid, at the hour of ten o'clock a. m. on that day, or as soon thereafter as counsel can be heard, will move this court for a new trial in said action and to vacate and set aside the decision and finding of facts filed this day by said court, excepting the fifth finding, and that said motion will be based upon the following grounds and assignment of errors, to wit:

First. Insufficiency of the evidence to justify said findings of facts in this, to wit:

85 *a.* There was no testimony tending to prove that Leander M. Black ever executed or delivered to said Rosa G. Black a deed for the Koch property.

b. The testimony tended to prove that no deed of this character was ever executed or delivered by said Leander M. Black to said Rosa G. Black or was ever seen by any person.

c. That there was no testimony tending to prove that said Leander M. Black, by deed to E. W. Toole, — the Randall property in trust for said defendants.

d. That the testimony tended to prove that said Leander M. Black was indebted in the sum of twenty thousand dollars and upwards in July, 1877, in said Gallatin county, and that over three thousand dollars of said indebtedness remains unsatisfied.

e. That the notice read by the sheriff to the bidders at the sale of said Randall property did not set out the rights of said defendants thereto.

Second. Errors in law occurring at the trial and excepted to by the plaintiff, to wit:

a. The court erred in allowing said defendants to offer the testimony of Madison M. Black, Rosa G. Black, James D. Chesnut, L. J. P. Morrill, Robert P. Vivion, A. Lamme, and C. P. Blakely to prove what is set forth in plaintiff's exception numbered 1
86 filed in this action.

b. The court erred in allowing said defendants to testify to what is set forth in plaintiff's exception numbered 2 filed in this action.

c. The court erred in refusing to allow the plaintiff to propound to Nelson Story two questions which are set forth in plaintiff's exception numbered 3 filed in this action.

d. The court erred in sustaining the objection of defendants to the question propounded by the plaintiff to Mrs. Perkins Russell, which is set forth in plaintiff's exception numbered 4 filed in this action.

Third. That the findings, conclusions, and judgment aforesaid are against law, to wit: The court erred in making the findings of facts and conclusions of law and in refusing to make the findings requested by the plaintiff, all of which are set forth in plaintiff's exception numbered 5 and filed in this action.

This application for a new trial will be made upon a statement of the case.

(Signed) J. J. DAVIS,
F. K. ARMSTRONG &
H. N. BLAKE,
Attorneys for Plaintiff.

87 Received a copy of the foregoing notice this fourth day of May, A. D. 1881.

(Signed) TOOLE & VIVION & PIERCE,
For Defendants.

And afterwards, to wit, upon the 25th day of April, 1882, the same being a judicial day of said court, the following proceedings were had in said cause, and order made as appears of record.

NELSON STORY *vs.* MADISON M. BLACK & ROSA G. BLACK.

In this action, the plaintiff having moved the court for a new trial, and said motion having been submitted and taken under advisement by the court, is now by the court denied, to which action of the court the plaintiff at the time excepted.

And thereupon the plaintiff filed his exception, which is in the words and figures here following:

88 *Plaintiff's Exception to the Order Overruling Motion for a New Trial.*

NELSON STORY *vs.* MADISON M. BLACK & ROSA G. BLACK.

Be it remembered that upon this twenty-fifth day of April, 1882, the above-entitled cause came before said court upon the motion and application of plaintiff for a new trial therein. Whereupon the court overruled said motion; and to the action of the court thereon plaintiff at the time excepted, and asks that this his bill of exceptions be signed and sealed, which is done accordingly.

E. J. CONGER, [L. S.]
Judge of said Court.

Notice of Appeal.

In the District Court, First Judicial District, in & for Gallatin County, Montana Territory.

NELSON STORY *vs.* MADISON M. BLACK *et al.*

89 To the above-named defendants and E. W. & J. K. Toole, their attorneys of record:

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of said Montana Territory from the judgment therein made and entered in the said district court on the 3rd day of May, 1881, in favor of the defendants and against said plaintiff, and from the whole thereof, and also from the order therein made and entered in said district court on the twenty-fifth day of April, 1882, refusing the motion of plaintiff for a new trial.

J. J. DAVIS,
F. K. ARMSTRONG &
H. N. BLAKE,
Att'ys for Plaintiff.

Received a copy of the foregoing notice of appeal this fourth day of May, 1882.

E. W. & J. K. TOOLE,
Att'ys for Def'ts.

Endorsement: Filed May 4, 1882. Theo. Muffly, clerk, by E. M. Gardner, deputy clerk.

Undertaking on Appeal.

In the District Court, First Judicial District, in & for Gallatin County, Montana Territory.

90 NELSON STORY *vs.* MADISON M. BLACK & ROSA G. BLACK.

Whereas the plaintiff in the above-entitled action is about to appeal to the supreme court of the Territory of Montana from a judgment entered against plaintiff in said action in the said district court in favor of the defendants in said action on the third day of May, 1881, for the sum of thirty-five $\frac{70}{100}$ dollars costs of suit: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned residents and householders of the county of Gallatin, Territory of Montana, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the appeal or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

GEO. WAKEFIELD. [SEAL.]
JAS. D. CHESNUT. [SEAL.]

91 TERRITORY OF MONTANA, *County of Gallatin:*

George W. Wakefield and James D. Chesnut, being first duly sworn, each for himself says that he is a resident and householder of the county of Gallatin, Territory of Montana, and is worth the sum of three hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEO. WAKEFIELD.
JAS. D. CHESNUT.

Subscribed and sworn to before me this fifth day of May, A. D. 1882.

PETER KOCH,
Notary Public.

Endorsement: Filed May 5, 1882. Theo. Muffly, clerk, by S. M. Gardner, deputy clerk.

92 TERRITORY OF MONTANA, *County of Gallatin:*

I, Theo. Muffly, clerk of the district court of the first judicial district of the Territory of Montana, within & for the county of Gallatin, do hereby certify that the foregoing transcript is a true, full, and complete copy of the statement on motion for a new trial, including all the pleadings, papers, documents, and evidence therein referred to, the plaintiff's notice of intention to move for a new trial, the order of court overruling the motion for a new trial, the exception of the plaintiff thereto, the plaintiff's notice of appeal, the plaintiff's undertaking on appeal, and of all the papers, proceedings, orders, and records in said transcript purporting to be copied or contained as the same now stand of record and remain on file in my office.

In witness of which I have hereunto subscribed my name and affixed the seal of said court at Bozeman this 20th day of July, 1882.

[Seal of Dist. Court.]

THEO. MUFFLY, *Clerk*,
By E. M. GARDNER, *Deputy Clerk*.

93 *Supplemental Record.*

In the District Court of the First Judicial District of the Territory of Montana within & for the County of Gallatin.

NELSON STORY *vs.* MADISON M. BLACK & ROSA G. BLACK.

Supplemental transcript on appeal.

The following judgment was duly entered by the clerk in the above-entitled action, as appears from the judgment book of said court on page 84, to wit:

Judgment.

In the District Court, First Judicial District, in & for Gallatin County, Montana Territory.

NELSON STORY *vs.* MADISON M. BLACK & ROSA G. BLACK.

This cause came regularly on for trial on the 26 day of April, A. D. 1881, J. J. Davis, F. K. Armstrong, and Henry N. Blake appearing for the plaintiff, and Messrs. Vivion and Pierce and E. W. Toole for the defendants. A trial by a jury having been expressly waived by the respective parties, the cause was tried before the court without a jury.

94 Whereupon witnesses on the part of plaintiff and defendants were duly sworn and examined, and documentary evidence introduced by the respective parties, and, the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court files its findings and decision in writing, and orders that judgment be entered herein in favor of defendants and against said plaintiff in accordance therewith. Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that Madison M. Black and Rosa G. Black, the defendants above-named, do have and recover of and from Nelson Story, the above-named plaintiff, their costs in the above-entitled action, taxed at the sum of thirty-five & $\frac{70}{100}$ dollars.

Judgment rendered May 3, 1881.

I, Theo. Muffly, clerk of the first judicial district court of the Territory of Montana within & for Gallatin county, hereby certify the foregoing to be a true copy of the judgment entered in said court in the above-entitled cause.

Attest my hand & seal this 2d day of Aug., 1882.

[L. S.] THEO. MUFFLY, *Clerk*.

95 In the Supreme Court of Montana Territory. August Term, A. D. 1882.

NELSON STORY, Plaintiff & Appellant,
vs.
MADISON M. BLACK and ROSA G. BLACK, Defendants & Respondents.

Be it remembered that in the present term, of August, in the year of our Lord one thousand eight hundred and eighty-two, the above-entitled cause was brought into the supreme court of the Territory of Montana by virtue of an appeal from the judgment of the court below, entered therein on the third day of May, 1881, as by the inspection of the transcript of the record of the district court in said cause, which was filed in the clerk's office of said supreme court on the 14th day of August, 1882, agreeably to the statute of said Territory and the rules of said supreme court, fully and at large appears.

And afterwards, at the January term, 1883, of said supreme
96 court, said cause came on to be heard on said transcript of record and was argued by counsel.

Whereupon the court, rendering its decision and judgment on appeal in said cause, delivered the following opinion in writing, viz:

Opinion of the Court by Wade, Chief Justice.

In the Supreme Court of Montana Territory. January Term, 1883.

NELSON STORY, Plaintiff & Appellant,
vs.
MADISON M. BLACK and ROSA G. BLACK, Defendants & Respondents.

Appeal from Gallatin Co., first district.

This is an action in the nature of ejectment to recover possession of lots 16 & 17 in block A of Black's addition to the town of Bozeman.

Appellant claims by virtue of a sale on execution and a sheriff's deed, and the respondents by reason of a parol gift from father to daughter-in-law.

97 On the trial the court found the following facts:

1st. That on the 31st day of August, A. D. 1875, the said Leander M. Black, father of defendant, Madison M. Black, executed to the defendant, Rosa G. Black, a deed to what is known as the Kotch property, which deed was delivered by placing it in an envelope and depositing the same upon the piano among the bridal presents given to the bride on the eve of her marriage in consideration of the natural love and affection of a parent to a child.

2nd. That by virtue of said deed defendants entered upon said property, went into possession and occupation thereof, and made valuable improvements thereon.

3. That they remained so in possession and occupation of the same until about the first day of July, A. D. 1877, when, by virtue of an exchange of property with the said L. M. Black, they, in pursuance thereof, entered into the actual possession and occupancy of

what is known as the Randall property (the property in question), and have ever since held possession of & occupied the same.

98 4. This exchange of the Koch property for said Randall property was made by the parties in good faith and accepted by defendants and the said Leander M. Black as a *bona fide* transfer of said property, and all the rights, title, and interest therein from one party to the other.

5. That no deed or memorandum was made in writing at the time of the exchange and transfer as aforesaid by the said parties.

6. That upon receiving possession of the said property under said exchange and transfer the said defendants on account thereof, and relying in good faith upon the same, made valuable and permanent improvements upon the said property and now occupy the same.

7. That after said exchange and transfer the said Leander M. Black conveyed by deed to E. W. Toole the said Randall property in trust for these defendants, and the said E. W. Toole, in pursuance of his trust, conveyed by deed the same to said defendants, and that soon after such exchange of property the said Leander M. Black conveyed the property so originally deeded to defendants and by them exchanged as aforesaid to one Peter Koch.

99 8. That said Leander M. Black at the time of making said deed of gift to defendants, was worth about one hundred thousand dollars, with small, if any, indebtedness.

9. That said Story thereafter became a creditor of said Leander M. Black, and upon a judgment in his favor against him sold the property under execution issued thereon, and became the purchaser of the same at such sale and received a sheriff's deed therefor; that said Story had actual notice of the possession of said property by defendants, and that at the time of the sale said sheriff read to the bidders, and in the hearing of said plaintiff and those present, a notice setting out the rights of said defendants in the premises then to be sold, being that in controversy.

Findings of fact by the court, like a general or special verdict, will not be disturbed by the appellate court if there is competent evidence to support them.

Questions presented by this appeal have relation exclusively to the testimony offered and received upon the trial, and a statement of the same will disclose the nature of the case and relation

100 of the testimony to the findings of fact.

Madison M. Black, one of the defendants, testified as follows: "I married Rosa G. Black, one of the defendants, at Bozeman, on August 31, 1875. On the night of this day a reception was held at the North Pacific Hotel in Bozeman, and my father, Leander M. Black, took me one side and congratulated me, and told me he had presented Rosa, my wife, with the Koch property; that the deed for the same was lying on the piano in the parlor with the other presents, and directed me to take possession of the same, which I did that evening, and remained in possession of the same from that night, August 31st, 1875, until some time in July, 1877; that upon the faith of the gift I put permanent and lasting improvements upon the said property by beautifying and ornamenting the grounds

with trees and shrubbery and by bringing water upon the same and digging ditches for that purpose. I also painted the house on the outside and papered and painted on the inside, and built a barn on the back of said lot.

"Some time in the latter part of June, or the first of July, 1877, — I was coming from Miles City to Bozeman, I met my father
101 near Countryman's place on the Yellowstone, and — that he desired to exchange the Koch property with me for the Randall property. We talked the matter over and agreed upon the exchange. I informed my wife and she was satisfied to make the exchange, and we did so exchange the Koch property for the property in controversy, and I immediately took possession of the same, and my wife and myself have been continuously in possession from that time to the present time, and are in possession now. At the time of the exchange my father agreed to make my wife a deed for the said property, and upon the faith of the agreement to make a deed and the exchange of the property we placed upon the property permanent and lasting improvements amounting, besides my own labor, to the sum of $600.00. Prior to my marriage and the gift of the Koch property on the 31st of August, 1875, my father removed all his furniture except that portion he gave to me at the time of my marriage from the Koch property to the Northern Pacific Hotel, and he never occupied it or exercised any control over it from and after August 31st, 1875, until he got it back from us by virtue of the trade
102 and exchange in July, 1877, nor did he ever exercise any ownership or control over the Randall property from July, 1877, up to this time. In 1875, at the time of the gift, my father had at least one hundred thousand dollars in cash and personal property, besides his real estate, which was valued and was worth seventy-five thousand dollars. At that time there were no debts, liens, or incumbrances whatever against my father that I know of. I was his agent at the time and in a situation to know his financial condition and standing."

Madison M. Black, Rosa G. Black, James D. Chesnut, L. J. Morrill, Robert P. Vivion, A. Lamme, and C. P. Blakely, testified as follows: That they were present at the North Pacific Hotel in Bozeman on the night of August 31, 1875, at a reception following the marriage of said defendants on that date; that it was the general talk and understanding at the time that Leander M. Black, the father of said Madison M. Black, had given to the defendants as a wedding present the land and dwelling-house thereon described as Black's residence in the answer, and situate in Bozeman; that an envelope was
103 seen upon a piano on which the wedding presents had been deposited containing the words "Deed to house and lot presented by L. M. Black," and that none of said witnesses saw any conveyance or deed of said property to any parties. The plaintiff objected to the introduction of this testimony on the ground that the same was irrelevant and immaterial, and insufficient to convey or affect real property and saved an exception.

Leander M. Black testified:

"Madison is my son and Rosa G. is his wife. They were married at Bozeman in August, 1875. I was present at the wedding. I was the owner of a lot on corner of Babcock and Black streets, Bozeman. It had a frame cottage on it, which, at the time of the wedding, I gave to them (my son and wife) as a wedding present. Notice of this fact was published in one of the Helena papers—I think the Herald—as among the wedding presents. I do not remember whether I made a conveyance to them of said property by deed at that time or not. They immediately after the wedding took possession
104 of said house and premises, and occupied the same until about the summer of 1877. The consideration for this present was the natural love and affection I felt for my son. If there was no deed executed and recorded it was simply neglect on my part, as I would have made it at any time if called upon, but my attention was never called to it. The intent of the gift was to convey the property absolutely, and I so regarded it as conveyed. The property was not incumbered at the time the gift was made; my liabilities did not exceed my assets. I can safely [say] that I was then worth at least one hundred thousand dollars over and above all debts, liabilities, and exemptions whatever.

"Some time in the summer of 1877 I made a proposition to them to exchange a house and two corner lots, known as the Randall property in Bozeman, for the one they occupied; and I told Rosa, one of the defendants, at the time, that if they would exchange I would deed the premises known as the Randall property to her individually—giving the title in her name—which I neglected afterwards to do. She and Madison were both satisfied to do this.
105 It was simply an exchange of properties which we all considered of equal value, and there was no difference paid either way. After the exchange I sold the first piece to Peter Koch."

Appellate courts pass upon objections that are raised and properly saved in the court below. If, upon the trial, incompetent or irrelevant testimony is received in evidence without objection, the question of its admissibility cannot be raised in the supreme court for the first time. Appellants contend that there is no evidence to support the findings of fact made by the court that Leander M. Black executed to the defendant, Rosa G. Black, a deed of the Koch property, for the reason that before any secondary evidence could be given of the existence or contents of such deed its loss must be accounted for, and for the further reason that, it being claimed that such a deed was once in existence, the court should have required its production, or if it had been lost or destroyed proof of such loss or destruction before permitting any proof of its contents whatever.

106 The answer to this is that no such objection was made upon the trial. The point of the objection and exception must be particulary and specifically stated, and this to enable the trial court to correct its own errors and to enable the party to remove the objection, if possible. For this reason the rule is general that the

appellate court reviews only what the lower court has passed upon. A party cannot permit incompetent testimony to be received in evidence without objection and in the appellate court ask to have the case reversed because incompetent evidence has been received. Neither can he object to testimony upon the trial for the reason that the testimony is immaterial or irrelevant, and in the appellate court object to it for the first time for the reason that it is incompetent. The point of the objection and the reason for it must be stated and saved in the bill of exceptions.

The testimony of Madison M. Black, Rosa G., his wife, and of Chesnut, Morrill, Vivion, Lamme, and Blakely that they were present at the reception that followed the wedding and heard the general talk that Leander M. Black, the father, had given to the defendants as a wedding present the lot and dwelling-house
107 thereon mentioned in the answer and described as Black's residence, and that they saw an envelope upon a piano on which the wedding presents had been deposited containing the words "Deed to house and lot presented by L. M. Black," and that none of said witnesses saw any conveyance or deed of said property to any parties, was objected to for the reason that the same was irrelevant, immaterial, and insufficient to convey or affect real property. It was not irrelevant or immaterial to prove the existence of this deed, and as preliminary to and as tending towards such proof it was competent to establish the fact that a paper or envelope marked as designated was seen among the other wedding presents. And if the contents of the deed were proved without objection it is an error that we cannot reach. The insufficiency of testimony does not have to do with its competency, and if competent testimony, or such that we must hold competent because not objected to, supports the finding it will not be disturbed. But the question as to the competency or materiality of the testimony in relation to this deed is not
108 vital to the case. The testimony conclusively shows:

First. That on the 31st day of August, 1875, the date of the marriage of his son, Madison M., with Rosa G., the father, Leander M. Black, was the owner of property over and above all debts, liabilities, and exemptions of the value of one hundred thousand dollars.

Second. That upon that day, as a marriage gift, he gave to the defendants the house and lot known herein as the Koch property, and that they, on that day, immediately entered into the exclusive possession thereof, made valuable improvements thereon with the knowledge of the donor, and lived and resided in the house for the period of about two years.

Third. That on or about the 1st day of July, 1877, while so in possession of the Koch property, they entered into an agreement with Leander M. Black to exchange the Koch property for the Randall property (the property in question), and that in pursuance of such agreement and exchange of properties (which were of the same value) they entered into the actual possession and occupancy of the Randall property, and have ever since held possession and occupancy of the same.

109 Fourth. That this exchange was made in good faith by the parties and accepted by the defendants and the said Leander M. Black as a *bona fide* transfer of said property and all the rights, title, and interest therein from one party to the other, but that no deed or memorandum in writing was made at the time of the exchange and transfer aforesaid.

Fifth. That upon receiving and entering into the occupancy and possession of the said property under and in pursuance of such exchange and transfer the defendants, on account thereof, and relying in good faith upon the same, made valuable and permanent improvements upon said property, with the knowledge of said L. M. Black, amounting to the sum of $600.00, besides the work of the defendants thereon.

Sixth. That after said exchange and transfer the said Leander M. Black conveyed by deed to E. W. Toole the said Randall property in trust for these defendants, and the said E. W. Toole, in pursuance of his trust, conveyed by deed the same to said defendants, and that soon after such exchange of property the said Leander M. Black conveyed the property he received in exchange to one Peter Koch.

110 The testimony establishing the foregoing facts is direct, clear, and conclusive. It comes up to the requirement that "in cases of parol gifts or parol sales made by a father to a son there is peculiar reason why the latter should be held rigidly to the proof of all those facts, which courts of equity have been accustomed to regard as equivalent to a written contract."

Harris *vs.* Richey, 56 Pa., 398.

"The very nature of the relation—that of father and child—therefore requires the contracts between parents and children to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. It must be direct, positive, express, and unambiguous. The terms must be clearly defined, and all the acts necessary for its validity must have especial reference to it and nothing else."

Poorman *vs.* Kilgore, 2 Casey, 372.

Here then we have the case of parol gift of land from father to son proven and established as the law requires, with notorious and exclusive possession taken, retained, and continued in pursu-

111 ance of an agreement to give the same, with full knowledge upon the part of the donor, together with permanent and lasting improvements placed upon the land by the donee upon the faith of the agreement to give, and this with full knowledge of the donor. I believe that such a possession takes the case out of the statute of frauds, and that the title of the donee will be protected in equity. If this were not so, the statute to prevent frauds and perjuries would encourage and protect them. Such a title could be enforced as against the donor, and if this is the case the donee would have the right to exchange his property for other property, and his equities would follow him and attach to his possession of the property so received in exchange.

Says Mr. Brown in his work upon the statute of frauds: "A principle analogous to that upon which taking possession of and making improvements upon the land claimed protects the claimant from the operation of the statute of frauds in courts of equity is applied to gifts of lands, upon the faith of which such possession has been taken and such improvements made, although there is in such
112 cases no contract enforc-able at common law, the gift, if strictly such, being without a consideration sufficient to support an action for breach of the promise to give." Sect. 491[a], p. 549.

Says Tilgham, C. J., in Tyler *vs.* Eckhart, 1 Bin., 380: "Although the courts are not disposed to extend the principles on which parol agreements concerning lands have been confirmed further than they have been already carried, yet they are bound by what has been decided. It has been settled that where a parol agreement is clearly proved, in consequence of which one of the parties has taken possession and made valuable improvements, such agreement shall be carried into effect. We see no material difference between a sale and a gift, because it certainly would be fraudulent conduct in a parent to make a gift which he knew to be void, and thus entice his child into a great expenditure of money and labor, of which he may reap the benefit himself."

If in such case the child acquires such an equitable interest in and title to the property as that he can hold it against the parent, so also he can hold it as against any creditor of the parent.
113 The creditor only succeeds to the rights of the debtor. He acquires by attachment and sale only such interests as the debtor might sell or dispose of for himself.

In Freeman *vs.* Freeman, 43 N. Y., Grover, J., speaking for the court of appeals, says: "The question then is whether a parol promise by one owning lands to give the same to another will be enforced in equity when the promisee has been induced by the promise to go into possession, and, with the knowledge of the promissor, make comparatively large expenditures in permanent improvements upon the land. It is and must be conceded that if the promise by parol was to sell the land for a valuable consideration to be paid therefor by the promisee such promise under this precise state of facts would be enforced. The ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent a fraud being practiced upon the parol purchaser by the seller by inducing him to expend his money upon improvements upon the faith of the contract and then deprive him of the benefit of the expenditure and secure it to
114 the seller by permitting the latter to avoid the performance of his contract. In the case supposed there has been no part performance of the contract, strictly speaking, except the taking possession, no part of the purchase-money having been paid, and yet the cases are numerous where performance of such contract has been decreed in equity, where possession has been taken under the contract and large expenditures upon permanent improvements made. In the present case possession has been taken under the promise and expenditure upon improvements made, yet it is insisted

that equity will not enforce the promise, for the reason that it was to give instead of having been to sell the land for a valuable consideration. Permitting the promisor to avoid performance operates as a fraud as much in the latter case as in the former, so far as expenditures upon improvements are concerned. The counsel for the appellant insists that there has been no part performance of the contract to give the land. The answer to this is that possession has been taken and valuable improvements made upon the faith of the promise. These acts constitute part performance by the respondent. It is true that the plaintiff has done nothing by way of performance on his part; it is not necessary that he should. Part performance by the party seeking to enforce the contract is sufficient. It is further insisted that an executory promise not founded upon any valuable consideration is a mere nude fact, furnishing no grounds for an action at law, and that performance of such a contract will not be enforced in equity. This is true so long as the promise has no consideration. Anything that may be detrimental to the promisee or beneficial to the promissor in legal estimation will constitute a good consideration for a promise. Expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise made to the party making the expenditure to give the land to such party, constitute in equity a consideration for the promise. The statute of frauds has no bearing upon such a case."

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Says Justice Gibson, in Sowers, adm'r, *vs.* Weaver, 84 Pa., 267: "That a parol gift from a parent to a child, properly executed by possession and improvement, is valid, notwithstanding the statute of frauds and perjuries, will be found to be the settled law of this State since the case of Syler *vs.* Eckhart, 1 Bin., 378." See also Stewart *vs.* Stewart, 3 Watts, Pa., 253; Young *vs.* Glendening, 6 Watts, 509; Bright *vs.* Bright, 41 Ill., 97; Guynn *vs.* McCauley, 32 Ark., 97; Shellhammer *vs.* Ashbaugh, 83 Pa., 24; Lobdell *vs.* Lobdell, 33 How., 347; Crosbie *vs.* McDawl, 13 Vesey, 147; Shepard *vs.* Bivin, 9 Gill, 32; Murphy *vs.* Still, 42 Tex., 123; Neale *vs.* Neales, 9 Wall., 1; Parsons on Contracts, vol. 3, p. 359; Hardesty *vs.* Richardson, 22 Amer. R., 57; 8 Am. R., 665 & note; Krutz *vs.* Ritmer, 55 Ill., 514; 3 Am. R., 657; 19 Am. Decisions, 398 & note; Turnell *vs.* Mines, 4 Wall.

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Applying now the doctrine of the law as indicated by these decisions to the case under consideration, and we hold that these defendants having taken the notorious and exclusive possession of the Koch property with the knowledge of L. M. Black in pursuance of his parol gift of the same to them, and made permanent and lasting improvements thereon upon the faith of such gift, with the knowledge of the donor, and having retained and continued such possession with like knowledge and upon the faith of such gift, they thereby so became the owners of the property as that at the time they exchanged the same for the Randall property they might have compelled a conveyance thereof to them from L. M. Black, the donor. And being so the owners they had the right to sell the property or to exchange it in good faith for

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other property with whomsoever they would and at their pleasure; and when they did exchange it for the Randall property the transaction was equivalent to a sale and purchase, with possession in pursuance thereof and payment of the purchase-money in full. The Koch and Randall property were of equal value. The one paid for the other. By virtue of such exchange the defendants entered into and retained possession of the Randall property
118 and made permanent and lasting improvements thereon upon the faith thereof and with the knowledge of L. M. Black.

All this occurred months before Story, the appellant, levied his attachment upon the property in his action against L. M. Black, and hence, at the time of such levy, the defendants were the owners of the entire equitable interest in and title to the property, and Black had no interest therein that could be reached by an attachment or otherwise. At the time of the attachment Black held the naked legal title to the property, but having been fully paid therefor, and the defendants being in possession, he became trustee of the property and held the title in trust for the real owners. His conveyance to Toole, and Toole's conveyance to defendants, was in execution of this trust. The defendants being in possession at the time of the levy of the attachment by Story, he was thereby charged with notice of all their rights and equities in the premises.

Hughes *vs.* United States, 4 Wall., 232.
McKensie *vs.* Jewitt, 15 Ohio St., 168.
119 Landis *vs.* Brant, 10 How., U. S., 348.
Jones *vs.* Marks, 47 Cal., 242.
Ray *vs.* Birdsey, Denio, 626.

The purchaser at a sale of real property on execution acquires all the right, title, interest, and claim of the judgment debtor therein (Code, sect. 329); but he acquires only such right and interest, and he takes the property subject to all the rights and equities of third parties which are capable of being enforced against the judgment debtor. "The rule of *caveat emptor* applies to execution sales." (Chumasero *vs.* Viall, 3 Mont, 379.)

Says Clifford, J. in Brown *vs.* Pierce, 7 Wall., 218: "Correct statement of the rule is that a lien of a judgment creditor creates a preference over subsequently acquired rights, but in equity does not attach to the mere legal title to the land as existing in the defendant at the time of its rendition to the exclusion of a prior equitable title in a third person.

"Guided by these considerations the court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment
120 debtor had in the estate at the time the judgment was rendered."

How, petitioner, 1 Paige Ch., 128.
Ellis *vs.* Towsley, *Id.*, 283.
White *vs.* Carpenter, 2 Paige, 219.
Buchan *vs.* Sumner, 2 Barb. Ch., 181.

Lownsbury *vs.* Purdy, 11 " 494.
Kirsted *vs.* Avery, 4 Paige Ch., 15.
Averill *vs.* Loucks, 6 Barb., " 27.
Doe ex dem. Strong *vs.* Smith, 3 McLean, 362.
Mason *vs.* Wallace, *Id.*, 148.
Bank of Muskingam *vs.* Carpenter's Adm., 7 Ohio, 21.
Daniel Lake *vs.* Samuel Doud *et al.*, 1 Ohio, 415.

The judgment is affirmed with costs.

DECIUS S. WADE,
Chief Justice.
E. J. CONGER,
Asso. Justice.

Filed Jan'y 30, 1883.

I. R. ALDEN, *Clerk.*

Thereupon judgment on appeal was entered in said cause in the words & figures following, to wit:

121 *Judgment on Appeal.*

In the Supreme Court of Montana Territory. January Term, A. D. 1883.

NELSON STORY, Appellant,
vs.
MADISON M. BLACK and ROSA G. BLACK, Defendants.

Whereas, in the present term of January, A. D. 1883, the above-entitled cause came on to be heard before said supreme court on the transcript of the record of the district court in said cause filed herein, and was argued by counsel: Whereupon on consideration it is now here ordered & adjudged by this court that the judgment of the court below, entered in said cause on the 3rd day of May, 1881, be, and the same is hereby, affirmed with costs; and it is hereby further ordered that said defendants and respondents, Madison M. Black and Rosa G. Black, recover against Nelson Story, appellant herein, ——— dollars for their costs herein expended and have execution therefor.

30th January, A. D. 1883.

122 And afterwards, to wit, on the 15th day of February, A. D. 1883, said plaintiff and appellant, Nelson Story, filed herein his writ of error to remove said cause to the Supreme Court of the United States, which said writ of error is in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of Mon-

tana Territory, before you, or some of you, in a cause between Nelson Story, plaintiff and appellant, and Madison M. Black and Rosa G. Black, defendants and respondents, a manifest error hath happened, to the great damage of the said Nelson Story, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties
123 aforesaid in that behalf, do command you that, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Morrison R. Waite, Chief Justice of said Supreme Court, this 15th day of February, A. D. 1883.

[Seal of Sup. C't, M. T.]

I. R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Allowed by—
D. S. WADE,
Chief Justice, M. T.

And on the 3rd day of March, A. D. 1883, the appellant filed his undertaking herein, to wit:

124 In the Supreme Court of the United States.

NELSON STORY, Plaintiff in Error,
vs.
MADISON M. BLACK and ROSA G. BLACK, Defendants in Error.

Know all men by these presents that we, P. W. McAdow and Caldwell Edwards, of the county of Gallatin, Montana Territory, are held and firmly bound unto Madison M. Black and Rosa G. Black, defendants in error, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Madison M. Black and Rosa G. Black, or to their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and each and every of them, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this third day of March, A. D. 1883.

Whereas the above-named Nelson Story, plaintiff in error, has sued out a writ of error to remove the above-entitled cause to the Supreme Court of the United States to reverse the judgment
125 rendered and entered therein by the supreme court of Montana Territory on the 9th day of January, 1883, in favor of said defendants and against said plaintiffs in error:

Now, therefore, the condition of this obligation is such that if the above-named Nelson Story shall prosecute his said writ of error to effect and answer all damages and costs which may be awarded against him if he shall fail to make good his plea, then this obligation shall be void; otherwise to be and remain in full force and virtue.

P. W. McADOW. [SEAL.]
CALDWELL EDWARDS. [SEAL.]

The form and penalty and sufficiency of the sureties to the foregoing bond approved and supersedeas as ordered this 3rd day of March, 1883.

D. S. WADE,
Chief Justice.

And afterwards, on the same day, said appellant filed herein his citation, of which, in words and figures, the following is a copy, viz:

126 *Citation.*

UNITED STATES OF AMERICA, *ss:*

In Supreme Court.

NELSON STORY, Plaintiff in Error,
vs.
MADISON M. BLACK and ROSA G. BLACK, Defendants in Error.

To Madison M. Black and Rosa G. Black, defendants in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein Nelson Story is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness Honorable Decius S. Wade, chief justice of the said court, this 15th day of Feb'y, A. D. 1883.

D. S. WADE,
Chief Justice.

Rec'd a copy of this citation this 3rd day of March, A. D. 1883.
E. W. & J. K. TOOLE,
Att'ys for Def't in Error.

127 In the Supreme Court of Montana Territory.

NELSON STORY, Plaintiff in Error,
vs.
MADISON M. BLACK and ROSA G. BLACK, Defendants in Error.

I, I. R. Alden, clerk of said court, do hereby certify that the fore-

going one hundred and twenty-six pages, numbered from one to one hundred and twenty-six, inclusive, contain a full, true, & correct transcript of certain pleadings, records, and proceedings filed, made, and had in said court in the above-entitled cause as the same appear of record in my office.

In witness whereof I have hereunto set my hand and affixed my official seal this 27th day of March, A. D. 1883.

[Seal Supreme Court, Montana Territory.]

I. R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Endorsed on cover: Montana Territory, supreme court. No. 39. Nelson Story, plaintiff in error, *vs.* Madison M. Black and Rosa G. Black. Filed 10th September, 1883.

Office Supreme Court U. S.
FILED.
NOV 8 1886
JAMES H. McKINNEY,
CLERK.

119-235

Supreme Court of the United States.

October Term 1886.—No. 39.

NELSON STORY, PLAINTIFF IN ERROR,

vs.

MADISON M. BLACK AND ROSA G. BLACK.

In Error to the Supreme Court of the Territory of Montana.

Brief for Plaintiff in Error.

General Statement.

This was an action of ejectment, by Nelson Story, the plaintiff in error, against Madison M. Black and wife, for lots 16 and 17 in block "A" of Black's addition to the town of Bozeman, Montana.

The plaintiff claimed title by virtue of a sale, on execution, and a sheriff's deed, in a suit by him against one Leander M. Black.

The defendants claimed by virtue of certain alleged transactions between them and Leander M. Black, in regard to the property, which are set up in the answer in this case. (Rec., p. 2.)

A trial by jury having been waived by the parties, under the Statute of the Territory, the issues of fact, in this

case, were duly tried by the Court. (Rec., pp. 6, fol. 16; 24, fol. 66.)

On the trial several exceptions were taken by the plaintiff in error to the rulings of the Court upon questions relating to the evidence, which were duly saved upon the record by formal bills of exceptions.

Before, and at the time of the submission of the case, the plaintiff requested the Court to make findings in writing; and its findings of fact and conclusions of law were filed in the cases, as required by the Statute of the Territory. (Rec., pp. 23, 24.)

Judgment was entered thereon by the District Court in favor of the defendants. (Rec., p. 26.)

A motion for a new trial having been overruled, the plaintiff appealed from the judgment and the order refusing a new trial to the Supreme Court of the Territory. (Rec., p. 33.)

That Court having affirmed the judgment of the District Court, the plaintiff below took the present writ of error. (Rec., p. 45.)

As it may possibly be said that this case should have been brought here by appeal, and not by writ of error, under the Act of April 7, 1874, "*concerning the practice in Territorial Courts and appeals therefrom*," we respectfully ask the Court to consider the view, that, although a jury was waived in this case by the parties, and the issues of fact therein were tried by the Court, under the authority of the Statute of Montana, the case was a *case* "*of trial by jury*" under that statute, and within the meaning of the second section of the act of 1874, and, therefore, properly comes here by writ of error.

That section provides:

"That the appellate jurisdiction of the Supreme Court over the judgments and decrees of said Territorial Courts

in *cases of trial by jury* shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe." (18 Stats., 27.)

These words, we respectfully submit, should be construed in connection with the *proviso* of the second section of the act, which is—

"That no party has been or shall be deprived of the right of trial by jury in *cases cognizable at common law.*"

It is respectfully submitted that the words, in the first section, "*cases of trial by jury*," receive interpretation from the proviso in the first section of the act, and that they are substantially equivalent to the words, "*cases cognizable at common law*," as used in that proviso.

Certainly, it would seem, the Act of 1874 did not intend to provide for a writ of error in a case cognizable in *equity*, where, under the requirement of the Statute of the Territory, the issues of fact were tried by a jury; and yet, it would appear, as we respectfully suggest, that such a case must come here by writ of error, and not appeal, if the absolute and universal test as to the proper appellate proceeding, in a territorial case, be the fact of whether or not there was a trial by jury.

It would seem, as we desire to submit, under the Act of 1874, that regard must be had to the *subject-matter* of and the *remedy* sought in a case from the Court of a Territory, *whose legislature recognizes, as the Statute of Montana recognizes, the essential distinction between law and equity;* and that if they are purely *legal*, and cognizable solely at law, and the Territorial Statute required the trial of the case by jury, unless the parties waived a jury trial, the case is one "OF TRIAL BY JURY," within the meaning of that phrase in the Act of 1874, although, in fact, a jury trial was waived and the issues of fact were tried by the Court.

By the Montana *Code of Civil Procedure*, in actions for the recovery of specific real property, and other common law cases, a jury trial *must* be had unless expressly waived in the manner specified in the Statute. (Secs. 241, 269.)

Statement of the Case.

The property in question is known, in the record, as the Randall property; and it is conceded that it was owned by Leander M. Black, father of Madison M. Black, defendant in error, in July, 1877. The general question, in the case, was whether Leander M. Black effectually parted with his interest therein, and transferred it to defendants in error after that time, and before July 10, 1878, when Story, the plaintiff in error, served an attachment upon the property in his suit against Leander M. Black.

The defendants in error, in their answer, alleged, that, on August 31, 1875, the day of their marriage, Leander M. Black executed to Rosa G. Black a deed of *another* piece of property, known as the Koch property, as a bridal present to her; that they remained in possession of that property until about July 1, 1877, when they exchanged it, by *parol* agreement with Leander M. Black, for the property in controversy, the Randall property; that they then took possession of the latter property and improved it; that soon after this alleged exchange of properties, L. M. Black sold and conveyed the Koch property to Peter Koch; that L. M. Black, in pursuance of an agreement to make a deed to defendants in error for the property in question, procured from one E. W. Toole, to whom he had before conveyed the property, a deed for the same to Rosa G. Black, dated June 28, 1879. (Rec., p. 2.)

The plaintiff in error, in his replication, *denied* that on August 31, 1875, or at any other time, Leander M. Black executed to Rosa G. Black a deed for the Koch property;

that there was any such exchange of property as alleged in the answer; and that the deed from Toole to Rosa G. Black for the property in controversy, was in pursuance of any such agreement as defendants alleged. (Rec., p. 4.)

The replication averred that, in July, 1877, and for a long time prior thereto, L. M. Black was largely indebted to plaintiff in error and others, and was insolvent, and incapable in law of giving or granting, in consideration of love and affection, any property to his children or others.

The District Court found for the defendants in error upon the issues joined by the pleadings; and among others the issue in regard to the alleged deed from Leander M. Black to Rosa G. Black, for the Koch property, dated August 31, 1875. (Findings of Fact, Rec., pp. 26–28.)

Assignments of Error.

The District Court, on the trial of this case, erred as follows:

1. In overruling the objection of plaintiff in error to the introduction by defendants in error of the testimony of Madison M. Black, Rosa G. Black, James D. Chestnut, L. I. Morrell, Robert P. Vivion, A. Lamme, and C. P. Blakely, (witnesses for defendants in error,) as contained and set forth in bill of exceptions numbered 1 in this record. (Rec., pp. 9, 10.)

2. In overruling the objection of plaintiff in error to the introduction by defendants in error of the testimony of Madison M. Black, (a witness for defendants in error,) as contained and set forth in bill of exceptions numbered 2 in this record. (Rec., pp. 8, 9.)

3. In sustaining the objection of defendants in error to the questions propounded, on behalf of plaintiff in error, to Nelson Story, (a witness for plaintiff in error,) which are contained and set forth in bill of exceptions numbered 3 in this record. (Rec., pp. 19, 20.)

4. In sustaining the objection of defendants in error to the question propounded, by plaintiff in error, to Mrs. Perkins Russell, (a witness for plaintiff in error,) which is contained and set forth in bill of exceptions numbered 4 in this record. (Rec., p. 21.)

5. In rendering judgment for defendants in error upon the *findings of fact* in this case, (Rec., pp. 26, 27,) which are insufficient to support that judgment.

Argument for Plaintiff in Error.

I.

The first assignment of error relates to the admission of the testimony of certain witnessess, who were allowed to testify, against the objection of plaintiff in error, that they were present, on the night of August 31, 1875, at a reception following the marriage of defendants in error; that it was the general talk that L. M. Black had given them, as a wedding present, the Koch property; that an envelope was seen upon a piano, on which the wedding presents had been deposited, containing the words, "Deed to house and lot, presented by L. M. Black;" and that none of the witnesses saw any conveyance or deed of said property to any parties. (Rec., p. 10.)

(A) This testimony was plainly inadmissible, as immaterial and irrelevant, and should have been excluded. It had no *tendency* whatever to prove the principal issue in the case

under the pleadings, as to the execution by L. M. Black to Rosa G. Black, on August 31, 1875, of a deed of conveyance for the Koch property.

The fact that people, at the wedding reception, *said*, or that it was the general *talk*, that L. M. Black had given his son and daughter-in-law the Koch property, and that they saw an envelope with the above words on it, did not *tend*, in the remotest degree, to prove the existence of such a deed as the answer alleged.

Nobody ever saw such a deed, and no amount of such testimony as was offered, would justify a finding that such a deed was executed by L. M. Black.

(B) But if the evidence objected to was technically admissible, it cannot be pretended that it was *legally sufficient* to justify the Court in finding, as matter of fact, in this case, as it did, that the deed alleged in the answer was executed and delivered to Rosa G. Black on August 31, 1875.

Unless the first and second findings of fact were based on this testimony, they were based on nothing, for it appears to be the only testimony which could give rise even to a *conjecture* that such a deed had an existence.

No Court could be justified in deciding, as a matter of fact, from the testimony in question, that a deed of conveyance of the Koch property was executed and delivered to Rosa G. Black; and it is evident that the Supreme Court of the Territory so thought, for, in its opinion, the theory of the alleged deed is abandoned, and the case is put upon the theory of an alleged *parol* gift of the Koch property, not to Rosa G. Black, but to the defendants, which is a totally different theory from the case alleged in the answer.

(C) Of course the contents of the alleged deed could not be proved, directly or indirectly, without proof of its existence and loss or destruction. (Riggs *v.* Tayloe, 9 Wh., 486; Stebbins *v.* Duncan, 108 U. S., 43.)

II.

The second assignment of error relates to the admission of the testimony of M. M. Black, in bill of exceptions No. 2, which was introduced, apparently, to prove (1) a parol gift of the Koch property, in 1875, by L. M. Black to *defendants in error;* (2) a parol contract between *one* of them, viz., M. M. Black, and L. M. Black, for an exchange of the Koch and Randall properties, in June, 1877. (Rec., pp. 8, 9.)

This evidence was objected to as incompetent and irrelevant, and not in writing.

(A) The evidence related to a different case from that set up in the answer.

The answer alleged a conveyance of the Koch property, by deed, from L. M. Black to Rosa G. Black; and that was the issue the parties came to try.

Evidence of a parol gift of the property to Black and wife did not support the issue or tend to prove it.

(B) As to the alleged gift of the Koch property; a verbal gift of land vests no right, legal or equitable, in the donee; (Rucker *v.* Able, 8 B. Mon., (Ky.,) 566; Collins *v.* Collins, 2 Grant (Pa.) Cas., 117;) and possession and improvement of the property by the donee furnish no ground for enforcing the promise. (Ridley *v.* McNairy, 2 Humph., (Tenn.,) 174; Pinchard *v.* Pinchard, 23 Ala., 649; Adamson *v.* Lamb, 3 Blackf., 446.)

(C) The parol contract for the *exchange* of the lands, alleged in the *answer*, (Rec., p. 3, fol. 7,) was a contract between the defendants (*both* of them) and L. M. Black; but the testimony of M. M. Black, in the second bill of exceptions, related to a verbal contract by him *alone*, with his father, for an exchange of the Koch and Randall prop-

erties. His wife, to whom the Koch property is said to have been given, was no party to the contract alleged.

The testimony, therefore, was clearly inadmissible under the rule laid down in *Purcell* v. *Miner* (4 Wall., 513) and *Williams* v. *Morris*, (95 U. S., 457.)

In the latter case the Court said:

"Where the attempt is to take the case out of the statute of frauds upon the ground of part performance, the party must show by clear and satisfactory proof the existence of the contract as *laid in the pleadings*, and the act of part performance must be of the *identical contract which he has in that manner set up and alleged.*"

Here the offer was to prove a verbal contract for the exchange of lands different from the contract laid in the answer, and possession under that contract, and not under the identical contract which the defendants in error set up and alleged in their pleadings; and, under the rule established by this Court, the testimony could not properly be introduced, and was improperly admitted by the Court.

III.

The third assignment of error relates to the ruling of the Court upon the objection of defendants in error to the two questions, propounded to the plaintiff in error as a witness in the case, set out in bill of exceptions No. 3. (Rec., pp. 19, 20.)

The ground of the objection is not stated in the exception; and it would clearly seem that the questions were proper ones, and the general objection to them should have been overruled.

IV.

The fourth bill of exceptions, upon which the fourth assignment of error is founded, relates to the action of the Court in sustaining the objection of the defendants in error

to the following question propounded to a witness for plaintiff in error, viz., "What did you hear Leander M. Black say about selling or leasing said property in October, 1877?" (Rec., p. 21.)

The relations of Leander M. Black to the property in question, as owner, after July, 1877, when the alleged exchange occurred, being a subject directly involved in the issues in the case, his acts and declarations tending to show that he was the actual owner and proprietor, in October, 1877, were competent evidence for the plaintiff in error.

V.

The facts found by the Court are not sufficient to support the judgment.

(A) The answer expressly averred that, at the time of the alleged parol agreement for an exchange, and as a part thereof, "the said L. M. Black agreed to make and execute a *deed* to these defendants for the property described in said complaint so exchanged," &c. (Rec., p. 3.)

Now, there is no finding that such an agreement was made by L. M. Black at that time, or at any time.

This must be fatal to the judgment rendered in the case.

This Court, as we have seen, has in substance said, what other Courts have often declared, that where an attempt is made to take a contract for the sale or exchange of real property out of the Statute of Frauds by part performance, the party is required *to state his case as he means to prove it*, and *then prove it as it has been stated.* (Cox *v.* Cox, 2 Casey, (Pa.,) 375; Poorman *v.* Kilgore, Ib., 372.)

There should be no relaxation of that rule in such a case as this, where the just rights of creditors are involved in a transaction which is set up to defeat those rights.

(B) It is clear that, if there was no *agreement* by L. M. Black to *convey* the Randall property to defendants, there was and could be no contract for an exchange which they

would have had the right to enforce against Black in a Court of Equity on the ground of part performance and fraud.

In the case of a parol contract for the exchange as well as sale of land, there must be "full, satisfactory, and indubitable proof" of the *contract* and its terms; and one of the terms must be shown to be an *agreement to convey the property;* and the acts of part performance relied on to bar the statute must distinctly appear to have been done *on the faith of the promised conveyance of the land.* (Purcell *v.* Miner, 4 Wall., 517, 519; Moore *v.* Small, 7 Harris, (Pa.,) 469.)

Therefore, in any view of this case, an express *finding* that L. M. Black agreed, as part of the alleged contract, to *convey* the property in question to defendants was necessary to warrant a judgment in their favor; and as no such fact is found by the Court, the judgment rendered should be reversed.

(c) The Court does not find, as matter of fact, that there was a present and absolute *gift* of the Koch property by L. M. Black to defendants, or that the improvements were made under and on the faith of such a gift of that property. (Rec., p. 26.)

Unless there was such a gift of the property, and the improvements were made on the faith of it, defendants acquired no title to it which could be exchanged for the Randall property.

The facts stated in the first and second findings in regard to the deed to Rosa G. Black do not show such an *absolute parting with the right of ownership* by L. M. Black as was necessary to constitute a valid gift of the property by him to the defendants. (Collins *v.* Collins, 2 Grant's Cases, (Pa.,) 117.)

J. Hubley Ashton,
Nathaniel Wilson,
Of Counsel for Plaintiff in Error.

119-285

IN THE SUPREME COURT

OF THE UNITED STATES.

October Term, A. D. 1886.

No. 39.

NELSON STORY,

Plaintiff in Error,

vs.

MADISON M. BLACK,
ROSA G. BLACK,

Defendants in Error.

POINTS AND AUTHORITIES OF DEFENDANTS IN REPLY.

EDWIN W. TOOLE and
JOSEPH K. TOOLE,

Counsels for Defendants in Error.

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STATEMENT OF CASE.

Before proceeding to answer the points presented by counsel for plaintiffs in error, we deem it proper to call particular attention to some uncontroverted facts, as disclosed by the record, and which we insist are conclusive in this case. It appears as a fact uncontroverted, that, if the deed to the Kotch property never was executed and delivered to defendant, Rosa G. Black, by L. M. Black, herself and husband were led to believe it was, and entered into possession accordingly, and made valuable and permanent improvements upon the strength of it. The oral agreement to ex-

change the property for what is known as the Randall property—being the premises in controversy—is established by the uncontradicted testimony of three witnesses, and is made one of the findings of the Court.

That in pursuance of the oral agreement, the defendants in error rendered up possession of the Kotch property and the improvements upon it, and were let into possession of the property in controversy, and, relying upon such agreement made valuable and permanent improvements upon the same in good faith, which facts are also made one of the findings of the Court. Upon an overwhelming preponderance of testimony, the Court also finds that the said L. M. Black was worth over seventy-five thousand dollars at this time. After the oral agreement to exchange was made, possession taken, and valuable improvements placed upon the premises in question (as above set forth), the plaintiff in error attached the same, obtained judgment, and sold it under an execution issued upon the judgment. The attachment, judgment, sale and purchase by plaintiff in error took place while the defendants in error were so in the actual possession and occupation of the property, under whatever equitable title or claim they had to it. Here, then. we have the claim of the respective parties to these premises from the time plaintiff in error acquired his first right by attachment, if he acquired any, up to the time of his purchase at sheriff's sale, and the receipt of the deed thereunder.

If defendants in error have a superior title to the property under the uncontroverted state of facts, then all the errors assigned are insufficient to work any injury to plaintiff in error, and he cannot prevail.

In this connection, it may also be remarked that before the sale of the property, L. M. Black had conveyed it with other property, under a general description, to E. W. Toole, who agreed, upon ascertaining the correct description of it, to reconvey it to defendant in error, Rosa G. Black. That in pursuance of this trust, the said E. W. Toole, before the execution-sale of the property, conveyed the same to the "cestui

qui trust," by reason of which it is claimed that the equitable title mentioned, which was good against plaintiff in error, became merged in the legal title, so that at the time of the commencement of this action, L. M. Black had no title whatever to the property in question, and was not therefore necessary for defendants in error to ask for or abtain any affirmative relief. Viewing the case as we must, to-wit: the exchange for or gift of this property (whichever it may be regarded) followed by delivery of possession, and the construction of valuable and permanent improvements upon the faith of it, the donor at the time being solvent, created such an equitable estate as would *defeat* the *claims* of a *subsequently* attaching creditor.

It would seem useless to proceed to a discussion of the questions presented by the brief of plaintiff in error. But as the points made by counsel seem to be regarded by them as vitally important, and are so urgently insisted upon, we will discuss them seriatim.

ARGUMENT.

I.

The first point presented is confined to the admissibility of certain oral testimony, which can in no manner affect the merits of the controversy. If we are correct, that no writing, under the circumstances of the case, was necessary, and that the delivery of possession, and improvements made in pursuance of a gift or exchange of property, takes it out of the Statutes of Frauds, it will be a complete answer to all that is said under this head. Upon this question we refer the Court to the authorities cited further on in this Brief, where the proposition more properly arises.

II.

The position that there was no evidence of the loss of the deed from L. M. Black to defendants in error, for the

Kotch property, so as to render oral proof of its contents competent, is untenable: First, because the deed or title to this piece of property is not in question; second, because no objection was made upon this particular ground. Where such an objection is made, the point of the objection and exception must be specially stated so as to afford the opposite party an opportunity to remove the objection if it be in his power to do so, by producing the deed or proving its loss or destruction. No such objection and exception being had, plaintiff in error cannot avail himself of it now. The citation of authorities upon this proposition is unnecessary.

III.

The point made in connection with that made in the preceding one, presents the anomulous position of insisting in one breath that the Court erred for admitting the evidence of the contents of the deed contained in the "yellow envelope," and in the next breath asserting that there was error in not admitting evidence of its contents. If there was neither proof of its contents or loss or destruction, there was certainly no error of law so far as the admission of testimony was concerned. As all the evidence shows that the Kotch property was a gift, this deed would simply have been the evidence of it, and without which it is claimed that the gift was ineffectual as against the claim of plaintiff in error. But it will be seen that in the absence of such deed, the defendants in error entered into possession under the belief that it was a gift, and in good faith made the valuable and permanent improvements mentioned in the findings of the Court. If, therefore, the Kotch property is to figure at all in the case, defendants in error had acquired an equitable title to it as against L. M. Black, which could have been enforced against him. Aside from the execution of the deed, the gift was complete; the equities of defendants in error had attached, and there was no "jus deliberandi" or "locus pœnitentiæ" left. We especially call attention to the authorities

hereinafter cited upon this point, where the question is more properly raised and more fully presented.

IV.

The propositions presented as to the validity of the gift, contain the only vital questions involved in the case, so far as the Kotch property figures in it at all. We contend that L. M. Black being solvent at the time of the parol gift of this property, and its validity being recognized by the parties interested, it formed a sufficient consideration between them to support the exchange, accompanied as it was by a change of possession, and substantial and valuable improvements also upon the property for which the exchange was made, and before it was attached. The evidence shows that the Kotch and Randall property—the property in question—were of equal value. Plaintiff in error had no claim upon either at that time; it is therefore a matter of no concern to him. His claim, if any, was upon the Randall property, and, as we shall presently see, it is of no consequence to him, in the absence of actual fraud, whether the conveyance, proper between the parties, were ever executed or not. The defendants in error being in the actual possession and occupancy of the property, was notice to the plaintiff in error of all their equities in the premises, if notice had been necessary. So far, then, as he is concerned, aside from the fact that he was a judgment creditor, and not a *bona fide* purchaser, equity treats that as done which ought to be done; and if in equity and good conscience L. M. Black could have been compelled to make a deed to the defendants in error, of the property in controversy at the time plaintiff in error attached it, the right could not be impaired by such attachment.

That one who is a judgment creditor, in purchasing at a sale under his judgment, takes the property subject to all the rights and equities of third parties, which were capable of being enforced against the judgment debtor in the *absence of statutes* prescribing a different rule. See

Brown vs. Pierce. 7th Wallace, 218.
Chemesanro vs. Viall, 3d Montana, 376.
Cross vs. Zane, 47th California, 603.
In re the Petition of Howe and wife, 1st Paige, Ch. 125.
Doc. Ex. Dem. Strong & Smith, 3d McLean, 362 and 148.
Bk of Muskingum vs. Carpenter's adm'rs et al, 7th Ohio, 21.
Daniel Lake vs. Sam'l Dond, V. E. Remmington and David Todd, 10th Ohio, 415.

Besides, the possession of defendants in error was notice to plaintiff in error of all their rights and equities to the property in question. See

Hughes vs. United States, 4 Wallace, 232.
Landis vs. Brant, 10th Howard U. S., p. 424.
McKenzie vs. Territt, 15th Ohio Stats., 162 and 168.
Jones vs. Marks, 47th California, 242 et seq.
Ray vs. Birdsey, (5th Denio. 626) 22nd N. Y., 567.

Further, there *is no such plea* that plaintiff in error was a *bona fide* purchaser. See

Brown vs. Child, 10th Peter, 177–211.
Byers vs. Fowler, 54 American Dec., 286 et seq.

These authorities, we believe, present the uniform rule.

V.

This brings us to the consideration of the question, which as claimed heretofore, is the only meritorious one involved in the case. If the gift by parol to the Kotch property was good, all of its elements and properties as such were imparted to the exchanged property in question. That a parol gift of a father to a son, where the son in pursuance of it enters into the possession of the property and makes valuable improvements upon the premises, will be upheld, the father being solvent at the time, we respectfully refer the Court to the following authorities, which, we insist, are decisive of the case:

Hardesty vs. Richardson, 22d American R., 57.
Hardesty vs. Richardson, 44th Maryland, 617.
Freeman vs. Freeman, 43d New York, 34.
8th American R., p. 665. See note.

Kurtz vs. Ritmer, 55th Ill., 514.
Freeman vs. Freeman, 3d American R., 657.
13th Vesey, p. 147.

Also—

Brown on Statute of Frauds, 465–467.
Smith vs. Barker, 6th Watts Pa., 509.
3d Vesey, 713.
Vaneman vs. Herdman, Lessee of Syler and wife vs. Peter & Frederick, 3d Watts Pa., 203.
Eckhart, 1st Birney, 378.
In the matter of Howe, 19th American Dec., 398–399, and especially note in this case.
Brown vs. Tierce, 7th Wallace, 218.

Numerous authorities in addition to the above might be cited in support of this position, but we claim these sufficient for the purpose. The authority cited by counsel in 4th Wallace, 513, et seq., Tursell vs. Mines, to support a contrary view is in perfect keeping with the principles heretofore announced by us. The Court say, in speaking of a parol exchange of lands, p. 519: "If either party had delivered a deed in execution of the trade or bargain, and the other had refused to fulfill his part by making a proper conveyance; *or if valuable improvements had been made by the party in possession, there would have been a case for a decree of specific execution.*" This is precisely what we contend for. The case cited was devoid of equity, while the one at the bar is replete with all the elements essential to constitute a perfect equity. To the same effect is the decision of the Supreme Court of the United States at its present term, 1882. Bigelow vs. Cures, Central Law Journal, Dec. 15, 1882, p. 479.

Even if the equities of defendants in error were not capable of being enforced against L. M. Black, he alone could take advantage. The moral obligation to convey was superior to the lien of the plaintiff in error as a judgment creditor, and he cannot thus be made to violate a duty binding upon his conscience.

Brown on Statute of Frauds, 128, 129, 130 and 135.
Murirs vs. Dodge & Wiley, 15th Ohio, 569.

It is nowhere alleged that the gift in question was made to hinder, delay or defraud the creditors of L. M. Black, and, as disclosed by the record, there would be no foundation, in fact, for any such allegation or claim. The intentions and object of the exchange and gift were commendable. They were accepted in a like spirit by defendants in error, whose equities attached prior to plaintiff's in error. The transaction does not come within any of the provisions of the Statute of Frauds, declaring it void as to creditors. That it should be upheld under such circumstances, we cite the Court to the following authorities:

Constant F. Minns vs. Morse, Dodge & Willey, 15th Ohio, 571.
John B. Brisbin et al vs. The Amer. Express Co. and Geo. McDonald, 15th Minn., 44.
Eliza B. Lefferson vs. Sarah E. Dallas et al, 20 Ohio Stat., 68.
Susannah Woods, Vernon Goff et al vs. Israel Dille et al, 11 Ohio, 455.

If, then, the view we take of the case is correct, all the errors assigned by counsel for plaintiff in error are utterly immaterial. The evidence of the numerous witnesses as to the "yellow envelope," the contents of it and the inscription upon it would be perfectly harmless if the gift could be made effectual and valid by the delivery of possession to, and occupancy and improvement of the property by the defendants in error, as it was occupied and improved by them. Nor could the general talk that the Kotch property was a bridal present, in any manner affect the question. There is no conflict in the evidence, as to the gift by L. M. Black of the property; and, if there were, it would have been proper corroborating testimony.

Sec. 3d Abbott's National Digest, 297, 95.

The authorities cited by counsel for plaintiff in error in reference to *unexecuted gifts inter vivos* and a naked *parol agreement to exchange* the property so given, for that in con-

troversy, are good law, but they are inapplicable to the case. The earlier gift to defendants in error is taken out of the operation of the rule by reason of the delivery of possession and the construction of valuable and permanent improvements upon it. In the second instance by an actual change of possession of the respective pieces of property; the *sale* and *conveyance* by *Black* of *that received* by *him*, and the occupancy and improvement by defendants in error of the property *delivered* to them. At this time, as we formerly suggested, there was no "jus deliberandi" or "locus pœnitentiæ" left. But, it is contended by counsel for plaintiff in error, that the deeds were never executed, and that consequently this gives the donor or barterer the right to deliberate, or is cause for retraction. This is not the case. Had the deed been executed, a perfect legal title would have been established, and no equitable relief whatever would have been required. If there is no "jus deliberandi" or "locus pœnitentiæ," Courts of Equity always enforce the specific performance by compelling a conveyance as contemplated by the parties. To say that the failure or refusal to execute the deeds created a "jus deliberandi" or "locus pœnitentiæ," and that equity would never enforce a contract in this situation, would forever conclude the investigation or enforcement of any other than purely legal titles to property, and dispense with the salutary principles of equity-jurisprudence, which have been recognized for centuries both in England and America. The correct doctrine is that the delivery of possession, and the erection of valuable and permanent improvements upon the property so delivered to defendants in error, and the sale of the exchanged property by L. M. Black to Kotch, took away the "jus deliberandi" or "locus pœnitentiæ," and in accordance with well settled principles, defendants in error could have invoked the aid of a Court of Equity, and have compelled a conveyance thereof; this was the status of the property when attached by the plaintiff in error. At the time of the gift and exchange of the property, and the improvements that were made on the strength

thereof, L. M. Black, as shown by the records and findings, was a wealthy man. This is the time the right of defendants in error attached and became fixed. The gift to a child by a parent in condition to make it, without infringing upon the rights of creditors, importing as it does a consideration of natural love and affection, will certainly not be regarded as inferior to that which lies in a sordid desire for the acquisition of filthy lucre. The plaintiff in error and his rights stand upon contracts based upon financial considerations. In these he will be protected. But the Courts will not allow him to avail himself of rights he never possessed, and become the instrument in subverting cherished hopes, and dissipating just and humane expectations.

But it is contended also by counsel for plaintiff in error that there was no writing creating a trust in Toole, and that as the conveyance from him to defendants in error was made after the attachment by plaintiff in error, it is void as to him. The sophistry of this is too transparent to require argument. If the rights of defendants in error were good against the attachment at the time it was made, why should it concern him whether they get the *legal title* under the *admissions* in the *answers* of L. M. Black, made in this case, which we have shown could not be avoided by a creditor, or through one who in equity and in good conscience was bound to convey. It united the equitable with legal title, and in no way affected the rights of plaintiff in error.

See 15th Ohio, 572. [supra]

Whether there was a gift by deed, or exchange by deed, we contend is of no importance in the case. There was a possession delivered, and improvements of a valuable and permanent nature made upon the faith of the gift and exchange. Being so done by defendants in error, it is immaterial what the real intention of L. M. Black was. It would be as much a fraud upon their rights to allow him, or any one, to defeat the intended gift, as to retract a fraudulent or pretended gift under the *facts* in *this* case.

Section 329, R. S. of Montana, reads as follows: "Upon a sale of real property, the purchaser shall be subrogated to and acquire, all the right, title and interest and claim of the judgment debtor therein, etc. * * * *" In pursuance of this sale, plaintiff in error could receive, and did receive, only a quit claim deed of the right, title and interest and claim of the judgment debtor to the property.

This subjects him to all outstanding equities that might be enforced against the judgment debtor. It can make no difference in such case whether he is affected with notice of the equitable claim or not. He steps, so to speak, into the shoes of the judgment debtor, and must take his chances as to his title. If, therefore, respondents' equities were enforceable against the judgment debtor, appellant is in no better situation, and has no defense. It is well settled that the grantee in a quit claim deed takes his title with notice of and subject to all the rights and equities against the vendor. See

Chumasero vs. Vial, 3d Montana, 379.
Parker vs. Morton 12th Wallace, 150.
Ames vs. Roberts 33d Texas, 768.
And especially May vs. Eclaire, 11th Wallace, 232. Stoffle vs. Shroder, 62d Missouri, 147. Renyon vs. Smith, 18th Federal Reporter and authorities there cited. Wade on Law of Notice, Sec. 204.

We submit that, upon the whole case, there can be no question but that the merits are with defendants in error, and that the judgment should be affirmed.

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